(23,673)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 166.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

FANNIE M. CONARTY, ADMINISTRATRIX OF THE ESTATE OF W. F. CONARTY, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 In the Crawford Circuit Court, June, 1912, Term.

FANNIE M. CONARTY, as Administratrix of the Estate of W. G. Conarty, Deceased, Plaintiff,

vs.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Defendant.

Caption.

Pleas Before the Honorable Jeptha H. Evans, Judge Present and Presiding on the Trial of the Above-entitled Cause.

2 In the Crawford Circuit Court, June, 1912, Term.

FANNIE M. CONARTY, as Administratrix of the Estate of W. G. Conarty, Deceased, Plaintiff,

vs.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Defendant.

Complaint at Law.

Comes now the above named plaintiff as the administratrix of the Estate of W. G. Conarty, deceased, complaining of the above named defendant Saint Louis and San Francisco Railroad Company and for her cause of action says:

That W. G. Conarty departed this life in the City of Fort Smith, Sebastian County, Arkansas, the place of his residence, on the 19th day of November, 1910, dying intestate, leaving surviving him his widow Fannie M. Conarty, thirty-four years of age, in good mental and physical health, and the following named children as his only heirs-at-law, to-wit:

Virginia Conarty, a daughter three years of age; Jack Conarty, a son seven years of age; and Elmore Conarty, a son nine years of age, all of whom are in sound mental and physical health.

That said W. G. Conarty, deceased, at the time of his death was thirty-eight years of age in sound mental and physical health.

And plaintiff says that her said intestate was greatly and intensely interested in the mental, moral and physical education and training of his said children; that he was constantly giving them the best possible opportunities for their moral training, physical development and mental education, and would have so continued to have interested himself towards the moral and physical training and

3 mental education of his said children had he lived.

And plaintiff says that at the time of the death of her said intestate he was earning as much as $1,500.00 per year at his business that of railroading as a switchman and brakeman, and that had he lived his said earnings would have increased from year to year in his said business; that out of the said sum he was so earning he was contributing as much as $1,200.00 per year towards the

care, comfort, support and maintenance of the said Fannie M. Conarty; Virginia, Jack and Elmore Conarty, his widow and children as aforesaid, and that had he lived he would have continued to so contribute said sum of money from month to month and year to year towards their said care, comfort, support and maintenance for the remainder of his life, and the remainder of the life of the said Fannie M., Virginia, Jack and Elmore Conarty during the life of the said Fannie M. and the minority of said children.

And plaintiff says that on the 8th day of December, 1910, she was by the probate court of the Fort Smith District of Sebastian County in the State of Arkansas granted letters of administration upon the estate of the said W. G. Conarty, deceased.

And plaintiff says that the defendant Saint Louis and San Francisco Railroad Company is now, and was on the days and dates hereinafter mentioned, a corporation organized and existing under the laws of the State of Missouri, and as such said corporation it is now and was on said days and dates the owner, operator and manager of a line of railroad in and through a part of the State of Texas, Oklahoma, Arkansas and Missouri, and on said days and dates, it was the owner, operator and manager of, and had under its control and its possession a number of freight cars and steam locomotives with and by which it was on said days and dates, over its said line of railroad, engaged in the business of moving and transporting freight, merchandise and property out of the said State of Missouri, into and through a part of the State of Arkansas, and into a part of the said States of Oklahoma and Texas, and out of and through the said States of Texas, Oklahoma and Arkansas, into the State of Missouri and other points in many of the States of the Union beyond the said State of Missouri.

And plaintiff says that the defendant is now and was on said days and dates the owner, operator and manager of a system of railroad tracks and side tracks in the City of Fort Smith in the State of Arkansas; said tracks and side tracks being commonly known as the yards of defendant in said City of Fort Smith; that in, upon and over said tracks and side tracks it caused cars loaded with merchandise, property and freight that was then and there being moved by it, over its line of railroad into and through a part of the said States of Texas, Oklahoma, and Missouri and out of a part of said States into the said State of Arkansas to be assembled, gathered and congregated for the purpose of being distributed and constructed into its trains for movement over its said line of railroad to different points in said States of Texas, Oklahoma and Missouri and other States of the Union. That in, upon and over its said line of tracks and said side tracks in said City of Fort Smith, it caused a part of its said cars and locomotives to be switched and moved with a part of its said locomotives, for the purpose of constructing them into trains to be moved and hauled by it over its said line of railroad into a part of said States out of said State of Arkansas.

And plaintiff says that on, and for some time prior to the 13th day of November, 1910, her said intestate W. C. Conarty was in the employ of the defendant as switchman or brakeman in defendant's

said yards in said city of Fort Smith, Arkansas, and that in
5 the discharge of his duty as said switchman or brakeman towards the defendant, it became and was necessary for him with one of said locomotives, to assist in moving and switching cars, loaded with merchandise that had been brought by defendant over its said line of railroad into said yards, into trains to be hauled by defendant over its said line of railroad into and through a part of said States of Texas, Oklahoma and Missouri and to switch and place cars, that had been brought by defendant, into said yards loaded with merchandise, property and freight out of a part of the said States of Texas, Oklahoma and Missouri so that said cars might be unloaded.

And plaintiff says that on the said 13th day of November, 1910, while her said intestate W. G. Conarty was so in the discharge of his duty as said switchman or brakeman, and while at his work of duty upon the foot-board of one of defendant's said locomotives which was then and there being moved by defendant over said tracks in said yards in said city of Fort Smith, Arkansas, for the purpose of switching, moving and handling cars loaded with freight, property and merchandise that had been brought by defendant into said yards over its said line of railroad out of said States of Missouri, destined to points in said States of Texas and Oklahoma.

And plaintiff says that while her said intestate W. G. Conarty was so upon said foot-board and in the discharge of his duty towards the defendant, and while said locomotives was being moved for the purpose of so distributing the said cars and switching them into a train to be moved by defendant over its said line of railroad out of the said State of Arkansas, into and through a part of the said States of
Oklahoma and Texas, he was by and through the carelessness,
6 negligence, wrongful and unlawful management and conduct of the defendant, as hereinafter set forth and complained of, caused to be caught between the front end of said locomotive and an end of a certain coal car; said coal car being then and there loaded with freight, merchandise or coal destined from some point on defendant's said line of railroad in the State of Arkansas to some point in the State of Texas. The initials, brand and number of said coal car is to plaintiff unknown, and the point at which said coal car was so loaded in said State of Arkansas, and the said point in Texas to which said car was being by defendant so transported over its said line of railroad is to plaintiff unknown. And plaintiff says that by reason of said intestate being so caught between said locomotive and said coal car, he was caused to be greatly and painfully bruised, mashed and crushed and *and* about his head, arms, chest, legs, and face, his muscles and nerves to be greatly and painfully torn, bruised and lacerated, the bones in and about his face, head, body and limbs to be crushed and broken so as to cause and ultimately bring about his death.

Plaintiff says that her said intestate by reason of said injuries so received, was caused and compelled to take his bed on the said 13th day of November, 1910, and there lie and languish in great mental and physical pain until the 19th day of November, 1910, on which last named date her said intestate died from said injuries and

wounds so inflicted upon him as aforesaid. That from the said 13th day of November, 1910, until the said 19th day of November, 1910, her said intestate consciously and knowingly suffered great mental and physical pain, and realized that death was impending and would ultimately result from said injuries, all of which plaintiff says was and is to the great damage of plaintiff said intestate's widow and children in the sum of One Hundred Thousand ($100,-
7 000.00) Dollars.

Plaintiff says that said negligence, carelessness, wrongful management and unlawful conduct of the defendant consisted in this to-wit: That it negligently, wrongfully, carelessly and in violation of the laws and acts of the Congress of the United States, allowed and permitted said coal car so loaded with coal as aforesaid to be hauled and used on its said main line and side tracks in said yards in said City of Fort Smith, and allowed and permitted said coal car, so loaded with coal as aforesaid, to be hauled and used, placed, switched and moved upon its said main line track and said side tracks in said yards in said City of Fort Smith, while and when said coal car, so loaded with coal as aforesaid, was not then and there equipped with a coupler that would couple onto or with said locomotive or onto and with another car automatically by impact, and while said coal car, so loaded with coal as aforesaid, was not then and there equipped with a drawbar measuring 31½ inches perpendicular from the level of the tops of the rails in said tracks to the center of said drawbar; said railroad being then and there a standard gauge railroad in its tracks. That said defect in said coal car so loaded as aforesaid was in or on the end of said car next to the approach of said locomotive upon which her said intestate was then and there so upon as aforesaid; that said end of said coal car was without a coupler or drawbar of any kind; that the draft timbers in said end of said car were broken down and torn out so that coupler and drawbar that would couple automatically by impact with said locomotive or another car, could not and was not kept and maintained in said car as the said act of Congress directs.

And plaintiff says that by reason of said negligence, carelessness, wrongful management and unlawful conduct of said defendant, as aforesaid, and while said coal car was so upon said main
8 line track, the said locomotive upon which her said intestate was then and there so upon, as aforesaid, ran into and collided with the said defective end of said coal car, thereby causing her said intestate to be caught between the said end of said coal car and said locomotive and injured as aforesaid.

These premises being considered, plaintiff prays judgment against the defendant Saint Louis and San Francisco Railroad Company in the said sum of $100,000.00 for the use and benefit of the said widow and children of the said W. G. Conarty, deceased, and for all other legal and proper relief.

SAM R. CHEW,
Attorney for Plaintiff.

Filed 2nd day of January, 1912. A. Hays, Clerk.

9 In the Crawford Circuit Court, June, 1912, Term.

FANNIE M. CONARTY, as Administratrix of the Estate of W. G. Conarty, Deceased, Plaintiff,

vs.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Answer.

The defendant, protesting against the court retaining jurisdiction of this cause and not transferring it to the Federal Court and protesting against the overruling of the demurrer herein and against being required to answer further, for answer to plaintiff's complaint:

First. Defendant is not advised as to who W. G. Conarty left him surviving as his wife and children. It therefore denies that the said W. G. Conarty left Virginia Conarty, age three years, Jack Conarty age seven years and Elmore Conarty his only children and sole heirs him surviving.

Denies that W. G. Conarty was thirty-eight years of age of sound mental and physical health.

Denies that he was greatly and intensely interested in the moral and physical — and that he was constantly giving them the best possible opportunities for their moral training, physical development and mental education and that he would have so continued if he had lived.

Denies that at the time of his death he was earning as much as $1500 per year and that had he lived his earnings would have increased from year to year in his business.

Denies that he was contributing as much as $1200 per
10 year toward the care, comfort, support, and maintenance of the said Fannie M. Conarty, Virginia, Jack and Elmore Conarty his widow and children and that had he lived he would have continued to so contribute said sum of money from month to month and year to year toward their care, support and maintenance for the remainder of his life and the remainder of the life of Fannie M. Conarty, Virginia, Jack and Elmore Conarty during their life and minority.

Denies that in and upon and over the tracks in the yards referred to in plaintiff's complaint, defendant caused cars loaded with merchandise, property and freight that was then and there being moved by it in to and through a part of the State of Texas, Oklahoma and Missouri and out of a part of said States in to said State of Arkansas, it caused to be assembled, gathered and congregated for the purpose of being distributed and constructed into its trains for movement over its said line of railroad to different points in said States of Texas, Oklahoma and Missouri and other States of the Union, and denies that any of said cars engaged in interstate commerce were being moved or used within said yards on said tracks.

Denies that it caused a part of said cars and locomotives to be switched and moved for the purpose of constructing them into

trains to be moved and hauled by it over its said line of road in to a part of said States out of the said State of Arkansas.

Denies that it became or was necessary for W. G. Conarty to assist in moving, and switching cars loaded with merchandise that had been brought by defendant over its said line of railroad into said yards, into a train to be hauled by defendant over its said line of railroad into and through a part of said States of Texas, Oklahoma and Missouri and to switch and place cars that had been brought by defendant into said yards loaded with merchan-
11 dise, property and freight out of a part of the said States of Texas, Oklahoma and Missouri so that said cars might be unloaded.

Denies that on the 13th day of November, 1910, the said W. G. Conarty was so in the discharge of his duty as alleged and that he was required by his duty to be upon the foot board of the locomotive of defendant and denies that said locomotive was then and there being moved by defendant for the purpose of switching, moving and handling cars loaded with freight, property and merchandise that had been brought by defendant into said yards over said line of railroad out of the States of Missouri destined to points in said States of Texas and Oklahoma.

Denies that W. G. Conarty was upon the foot-board of the engine in the discharge of his duty toward defendant or that said locomotive was being moved for the purpose of distributing and switching cars into a train being moved by defendant over its said line of railroad out of said State of Arkansas into and through a part of the said States of Oklahoma and Texas.

Denies that he was, by and through the carelessness, negligence and wrongful and unlawful management and conduct of defendant as alleged, caused to be caught between the front end of the locomotive and the front end of a certain coal car.

Denies that the coal car was loaded with freight, merchandise or coal destined from some point on defendant's line of railroad in the State of Arkansas to some point in the State of Texas.

Denies that said W. G. Conarty was caught between said locomotive and said coal car; that he was greatly and painfully bruised mashed and crushed in and about his head, arms, chest, legs, face, that his muscles and nerves were greatly and painfully torn, bruised and lacerated the bones about his head, face and body and limbs were crushed and broken or that his death was caused thereby as alleged in complaint.

12 Denies that he was caused to take his bed and lay and languished in great mental and physical pain until the 19th of November, 1910, and that on said date he died, from said wounds. That from the 13th to the 19th of November, 1910, he consciously and knowingly suffered great mental and physical pain and realized that death was impending and would ultimately result from said injuries to the damage of the plaintiff and the widow and children in the sum of 100,000.00 or in any other sum as alleged in complaint.

Denies that defendant negligently, wrongfully and carelessly and in violation of the laws and act of congress of the United States

allowed and permitted said coal car so loaded with coal as aforesaid to be hauled and used on its said main line and side tracks in said yards in said city of Fort Smith and allowed and permitted said coal car so loaded with coal as aforesaid to be hauled and used, placed switched and moved upon its said main line track and side tracks in said yards in the city of Fort Smith while and when said coal car so loaded with coal as aforesaid was not then and there equipped with a coupler that would couple onto or with the said locomotive or onto or with another car automatically by impact and while said coal car so loaded with coal as aforesaid was not then and there equipped with a drawbar measuring 31½ inches perpendicular from the level of the tracks of the rails in said tracks to the center of said drawbar; that said defect in said coal car was in or on the end of the car next to the approach of the locomotive; that said coal car was without a coupler or drawbar of any kind and that the draft timbers in said end of said car were broken down and torn out so that a coupler and drawbar that would couple automatically by impact could not and was not kept and maintained in said car as the Act of Congress directs.

13 Defendant denies that said car was engaged in Interstate Commerce at said time or that the locomotive on which it is alleged plaintiff was riding was engaged in Interstate Commerce at said time, and denies that the alleged want of a coupler had anything whatever to do with the alleged injury to deceased.

Denies that by reason of the alleged negligent careless and wrongful management or unlawful conductor of defendant as alleged, and that while said coal car was upon the main track, that the locomotive upon which plaintiff's interstate was then upon ran into and collided with the said defective end of said car thereby causing her said interstate to be caught between the said end of said coal car and locomotive and injured as aforesaid.

Denies that the plaintiff has been damaged in the sum of $100,000.00 or in any other sum.

Second. Defendant, further answering says that deceased was entirely familiar with the manner in which business was done and conducted in the yards in the city of Fort Smith and with the manner in which it was being done and conducted at the time of his alleged injury. That the business was being done and conducted in the usual and ordinary manner and that by remaining in the service without objection or complaint, he assumed the risk of injury therefrom.

Third. Defendant, further answering says that any injuries received by the said W. G. Conarty were caused and contributed to by his own carelessness and negligence.

Wherefore defendant prays judgment.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.
By B. R. DAVIDSON, *Attorney.*

Filed June 26th, 1912. A. Hays, Clerk.

14 *Summons.*

Summons issued January 2, 1912. Returned served on Defendant on 2nd. day of January, 1912.

15 On the 17th day of June, 1912, a petition to transfer this cause to the Federal Court, was filed, in words and figures as follows (caption omitted):

Petition to Transfer.

To the Honorable J. H. Evans, Judge of the Circuit Court of Crawford County, in the State of Arkansas:

Your petitioner, the St. Louis & San Francisco Railroad Company respectfully shows that it is defendant in the foregoing entitled suit; that the matter and amount in dispute in the above entitled cause exceeds exclusive of costs, the sum or value of $3,000.

That the controversy in said suit is between citizens of different States; that the petitioner was at the time of the commencemnt of this suit and still is a citizen of the State of Missouri; that it is a corporation created and organized by virtue of and under the laws of the said State of Missouri and that its principal place of business is in the city of St. Louis in said State. That Mrs. Fannie M. Conarty the plaintiff, was at the time of the commencement of this suit and still is a citizen and resident of the State of Arkansas residing within the Western District of said State, Fort Smith Division; that Virginia Conarty, Jack Conarty and Elmore Conarty and each of them were at the time of the commencement of this suit and still are, citizens and residents of the State of Arkansas in the Western District thereof, Fort Smith Division. And your petitioner offers herewith a bond with good and sufficient surety for its entering in said District Court of the United States on the first day of its next session, a copy of the record of this suit and for paying all costs that may be awarded by said District Court if said Court shall hold that this suit was wrongfully or improperly removed thereto, and
16 it prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept said surety and bond and cause the record herein to be removed into said Circuit Court of the United States in and for the Western District of Arkansas, Fort Smith Division, and it will ever pray.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
By B. R. DAVIDSON, *Attorney.*

Filed June 17th, 1912. A. Hays, Clerk.

And on said date a bond to transfer said cause was filed in words and figures as follows, which bond was approved by the clerk.

(Here Clerk will copy bond.)

17 That on the 18th day of June, 1912, the defendant moved this Court to transfer said cause to the Federal Court upon said petition and bond, but the Court overruled said motion and refused to order said cause transferred, to which action of the Court in refusing to transfer said cause, *the* at the time excepted.

Crawford Circuit Court Record Book I. 342. A. Hays, Clerk.

18 In the Crawford Circuit Court, June Term, 1912.

FANNIE M. CONARTY, as Administratix of the Estate of W. G. Conarty, Deceased, Plaintiff,

vs.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Bond for Removal.

Bond.

Know all men by these presents: That the St. Louis & San Francisco Railroad Company as principal and the Equitable Surety Company and J. R. Brown as surety are held and firmly bound unto Fannie M. Conarty as administratrix of the estate of W. G. Conarty in the penal sum of $500.00 the payment whereof well and truly to be made unto the said Fannie M. Conarty as administratrix, her successors, and assigns, we bind ourselves, our heirs, representatives and assigns jointly and severally firmly by these presents.

Yet, upon these conditions, the St. Louis & San Francisco Railroad Company, a corporation having petitioned the Circuit Court of Crawford County in the State of Arkansas for the removal of a certain cause therein pending wherein Fannie M. Conarty as administratrix of the estate of W. G. Conarty is plaintiff and the St. Louis & San Francisco Railroad Company is defendant, to the district court of the United States in and for the Western District of Arkansas, Fort Smith Division.

Now, if the said St. Louis & San Francisco Railroad Company, your petitioner, shall enter in the said District Court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be

19 awarded by said District Court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and virtue.

Witness our hands and seal. this 15th day of June, 1912.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
By B. R. DAVIDSON, *Attorney.*
EQUITABLE SURETY COMPANY,
By J. T. EASON & CO., *Agent.*
J. R. BROWN.

Approved:
A. HAYS, *Circuit Clerk.*

Filed June 17th, 1912. A. Hays, Clerk.

20 MRS. FANNIE M. CONARTY, as Administratrix of the Estate of W. G. Conarty, Deceased, Plaintiff,

vs.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Defendant.

Judgment.

Be it remembered that on this day this cause came on for hearing, whereupon came the plaintiff through her attorney, Sam R. Chew, and came the defendant through its attorney, B. R. Davidson, and both parties, answering ready for trial thereupon came a jury of the regular panel who were duly selected, empaneled and sworn, to try the issues of facts; and the jury after having the evidence, instructions of the court, argument of counsel, returned into court the following verdict:

We the jury find for the plaintiff and assess the damages at Ten Thousand Dollars ($10,000). George Harrison, Foreman.

It is therefore considered, ordered and adjudged, that plaintiff have and recover of the defendant, St. Louis and San Francisco Railroad Company, the sum of Ten Thousand Dollars ($10,000) her damages, and all of her cost herein laid out and expended and that execution may issue therefor, and thereafter, to-wit: on the 28th day of June, 1912, the cause came on for further hearing upon motion for a new trial, on this day filed by defendant, when comes the parties, plaintiff and defendant, by their respective attorneys, and the court being well and sufficiently advised, doth overrule said motion for a new trial, to which action of the court defendant at the time excepts and is given ninety days within which to prepare and file its bill of exceptions and prays an appeal to the Supreme Court, which prayer is by the court granted and sustained.

21 STATE OF ARKANSAS:

June, 1912, Term.

MRS. FANNIE M. CONARTY, as Administratrix of the Estate of W. G. Conarty, Deceased, Plaintiff,

vs.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Before His Honor J. H. Evans and a Jury.

Bill of Exceptions.

Appearances:

Sam R. Chew, Esqr., E. L. Matlock, Esqr., For Plaintiff.
B. R. Davidson, Esqr., J. R. Brown, Esqr., For Defendant.

Bill of Exceptions.

Be it remembered that on the trial of this cause, the following proceedings were had and done, to-wit:

22 Plaintiff to maintain the issues upon her part, introduce the following testimony, to-wit:

23 *Testimony of S. P. Haas.*

S. P. HAAS, called as a witness on part of plaintiff, after having been first duly sworn, was examined in chief by Mr. Chew, and testified as follows:

Q. Will you please tell us how you pronounce your name?
A. S. P. Haas.
Q. H-a-s-s?
A. H-a-a-s.
Q. S. P. Haas is the name?
A. Yes, sir.
Q. How old a man are you Mr. Haas?
A. Thirty-seven.
Q. Where do you reside, please?
A. Fort Smith.
Q. What is your business, what occupation do you follow there?
A. I am Division Freight Agent for the Frisco.
Q. St. Louis and San Francisco Railroad Company?
A. Yes, sir.
Q. Have you in your possession there a record kept by the St. Louis and San Francisco Railroad Company showing the movement of a car about the 9th of November, 1910, loaded with coal? Just answer that question, please?
A. Yes, sir.
Q. Will you be kind enough to turn to your record and tell the jury and the court what day that car branded "N. O. & N. E." and give us the number of it—arrived in the city of Fort Smith?
A. On November 9, 1910.
Q. Now, give us the number of the car please, Mr. Haas?
A. N. O. & N. E. 13239.

24 Q. Tell the court and jury whether or not that car was loaded when it came into the yards, according to your record?
A. The record shows it loaded.
Q. With what?
A. Coal.
Q. Tell the jury what station, according to your record, that car originated from, that is what station did it come from into Fort Smith?
A. It is listed from station 429.
Q. To get it in the record, I will ask you if the St. Louis and San Francisco Railroad Company number their stations?
A. Yes, sir.
Q. Now, you say it came from station 429?
A. Yes, sir.
Q. Tell the court and jury what station 429 is, please?
A. Jenson.
Q. Is that in Arkansas or in Oklahoma?
A. I think it is in Arkansas.
Q. You are correct about that, Jenson, Arkansas. What does the record show as to the condition of that car when it got into the

city of Fort Smith—you say it was loaded with coal—what does the record show as to its condition when it came into Fort Smith?

A. From my notation here it shows "B. O".

Q. What do you mean by that?

A. Bad order.

Q. Turn to the record and tell the court and jury when that car, if at any time, it left Fort Smith, the car that you refer to?

A. I have a record showing the car forwarded on November 19, 1910.

25 Q. This same car that you spoke of from the other road?

A. Yes, sir.

Q. Tell the court and jury whether or not that car was loaded when it was forwarded?

A. The record shows it was loaded.

Q. With what?

A. Coal.

Q. To what point was it forwarded to?

A. The destination is show- as 584.

Q. What do you mean by 584?

A. That is the station number for Paris.

Q. Paris in the State of Texas?

A. Yes, sir.

Q. Well, that car left Fort Smith on the 19th of November, with a car of coal destined to Paris, Texas?

A. That would not show it was destined there.

Q. It went over that division?

A. Yes, sir.

Q. Who handled that car from Fort Smith into Paris, Texas, that is what railroad company?

A. Frisco.

Q. The St. Louis and San Francisco Railroad Company?

A. Yes, sir.

Q. Now, I will ask you from your own knowledge whether or not the St. Louis and San Francisco Railroad Company handles freight out of Arkansas into Texas, into Oklahoma and out of Missouri into the State of Arkansas and were so handling freight on the 9th, 12th, and 13th days of November, 1910?

A. I don't quite understand what you mean by Missouri.

26 Q. Out of Missouri into the State of Arkansas and through the State of Arkansas into Oklahoma and into Texas. Were they handling freight of that kind?

A. Yes, sir.

Q. In what way please, in box cars, in coal cars?

A. Yes, sir.

Q. That is what I wanted to get; I didn't want to lead you.

Cross-examination by Mr. DAVIDSON:

Q. Mr. Haas, what time in the day did it arrive on November 9th?

A. The records show 9:20 a. m. No, I beg your pardon; got the wrong book; 1:35 a. m.

Mr. CHEW: That it arrived in Fort Smith?
A. Yes, sir.

Mr. DAVIDSON (continuing:)

Q. It came from Jenson?
A. Yes, sir.
Q. When it departed, did it go back over the same line from which it had been received, to Jenson?
A. Yes, sir. Of course, I hav-n't the record, Mr. Davidson, as to what happened to the car after it left Fort Smith but it would have to go back over the same line.
Q. What is the distance from Fort Smith to Jenson?
A. Well, about fourteen miles.
Q. Then it was brought in from Jenson as a bad order car to Fort Smith?
A. I would so understand it.
Q. And when it left was it marked bad order or not?
A. No, sir.
27 Q. Does the record show what it was loaded with when it left?
A. Yes, sir.
Q. The same as when it came in—coal?
A. Yes, sir.

Redirect examination by Mr. CHEW:

Q. Mr. Haas, just one other question. Do you handle all the freight that comes in from the southern part, that is south of Fort Smith, over the line of the St. Louis and San Francisco Railroad Company for Fort Smith, and stops there, do you handle it all?
A. The Frisco you mean?
Q. Yes, sir.
A. Yes, sir.
Q. Do you know whether or not there is a coal mine at Jenson?
A. I don't know; I don't think so.
Q. What is the company's coal mine beyond Jenson?
A. Well, I don't know the location of those coal mines.
Q. I will ask you if Hackett City is on the line of the St. Louis and San Francisco Railroad Company?
A. Yes, sir.
Q. I will ask you if you know if there is a coal mine there?
A. I think there is some near there.
Q. I will ask you to state whether or not Hackett City is south of Jenson on the line of the St. Louis and San Francisco Railroad, or southeast?
A. Southeast, I think.

28 Recross-examination by Mr. DAVIDSON:

Q. Mr. Haas, there are a number of coal mines out on the branch that runs from Jenson?
A. Yes, sir.
Q. What points are there out on that line?

A. I will refer to my record. Do you want them as they are listed here in the book?

Q. Yes, sir.

A. Branner, Hackett, Double Day, Montreal, Williams, Midland, Burma, Turnip Seed, Arkoal, Huntington and Mansfield.

Q. Do these different points ship coal through Jenson to Texas?

A. Yes, sir.

Q. Do you know where that car was billed from originally?

A. I think from Huntington.

Q. To what point, do you know?

A. No, sir, I don't know the destination.

Q. It was some point in Texas, wasn't it?

A. I think so.

Redirect examination by Mr. CHEW:

Q. Just one other question. I will ask you if under the system you have now and had in existence in November, 1910, if there is not a through billing for through cars over the system from the point of origin to the point of destination?

A. Well, that car-ies. We have through billing in some instances and in some instances it is billed to the connecting line.

Q. Is there any reason for a car originating as you say at Huntington destined to Paris, Texas, to come to Fort Smith?

29 A. No, sir.

Q. I will ask you if at Jenson there is not a junction point with what is known as the main line of the St. Louis and San Francisco Railroad from Fort Smith to Paris, Texas?

A. Well, I don't think it is hardly a junction.

Q. They make connection there; you have got a "Y" and switches there for transferring cars from the branch line onto the main line, do they not?

A. Yes, sir.

Q. Then, if there was nothing the *latter* with the car and it was loaded with coal, it would leave Huntington and go to Jenson and from there on to its point of destination in the State of Texas would it not.

A. Yes, sir.

Recross-examination by Mr. DAVIDSON:

Q. Mr. Haas, you say there is no reason for a car coming to Fort Smith? Suppose a car should be badly damaged, then where would it be brought from Jenson?

A. Of course, my answer was if the car was in good shape.

Q. You mean if the car was in good shape it would not come through Fort Smith?

A. No, sir.

Q. But if it was in bad shape, then where would it come?

A. It would depend on the circumstances. If they could repair it at Jenson they would, but if they could not, they would bring it to Fort Smith.

30 Redirect examination by Mr. CHEW:

Q. You say if the repairs could not be made at Jenson they would bring it to Fort Smith? They had a repair station at Jenson?

A. I think they made light repairs there; I don't know.

Witness excused.

31 *Testimony of Lee Armstrong.*

LEE ARMSTRONG called as a witness on behalf of plaintiff, after having been first duly sworn was examined in chief by Mr. Chew, and testified as follows:

Q. Mr. Armstrong, is Lee Armstrong your name?

A. Yes, sir.

Q. Where do you reside, Mr. Armstrong?

A. Fort Smith.

Q. How old a man are you, please?

A. Forty years old.

Q. Where did you reside in November 1910?

A. Fort Smith.

Q. What business were you engaged in at that time?

A. Night yard master, Frisco.

Q. When you speak of Frisco, do you mean to state the St. Louis and San Francisco Railroad Company?

A. Yes, sir.

The COURT: Have it in the record then when any witness speaks of Frisco it means the defendant company.

Q. Did you know a man by the name of W. G. Conarty over there at Fort Smith?

A. I did.

Q. I will ask you to state whether or not he was employed by the Frisco railroad in November 1910?

A. He was.

Q. Under whose supervision and orders did he work?

A. He worked under my supervision and orders.

Q. Under the supervision of Lee Armstrong?

A. Yes, sir.

32 Q. You were the night yard master?

A. Yes, sir.

Q. Where were you on the night of the 12th, I mean the night of the 13th, or the morning of the 14th of November, 1910?

A. I was working there in the yards.

Q. When you say "there" do you mean Fort Smith?

A. Yes, sir, Fort Smith.

Q. I will ask you to state, please Mr. Armstrong, the length of those yards?

A. Well, the length of the yards, I should say altogether, it is three miles.

Q. Three miles?

A. Yes, sir.

Q. What direction, generally, do they run, north and south or east and west?

A. East and west.
Q. Which do you term the east yard?
A. The east yard is the yard north of "J" street.
Q. Now, would that be north of the Iron Mountain and Frisco depots and passenger stations?
A. Yes, sir, it would be north of the Iron Mountain and Frisco stations.
Q. That would be up the river?
A. Down this way.
Q. That would be what you call——
A. What you call the east yards.
Q. That would be coming in this way?
A. Yes, sir.
Q. Then the yard from "J" street up the river, what would you call that?

33 A. Call that the west yard.

Q. Now, how many men were working in the yard on the night of the 13th, or the morning of the 14th of November, 1910 under you?
A. Two crews, three switchmen, an engineer and fireman to each crew, that makes ten men.
Q. How many engines were you using, two?
A. Two.
Q. All in the same yard at the same time or different parts of the yard.
A. Their duties lots of times brought them in the same part of the yard at the same time.
Q. How long had Mr. Conarty been employed there in the yard at the time you speak of?
A. Well, I couldn't exactly say because I come there in November 1908 and he was there when I come there.
Q. And he had been employed then from November 1908 to November 1910?
A. That I know, yes, sir.
Q. Now, where were you and who was with you on the night, we will call it the 14th of November or the morning of the 13th of November, 1910, where were you?
A. Well, I was in and about the yards at all times during the night.
Q. In and about the yard?
A. Yes, sir.
Q. I will ask you to state whether or not you know where the Arkansas Cotton Oil Mill is there?
A. I do, yes, sir.

34 Q. Where is it related as to the main track of the St. Louis and San Francisco Railroad and the Arkansas River?
A. It is between the main track and Arkansas River.

Q. And where is it located as to the passenger station of the St. Louis and San Francisco Railroad Company and Garrison Avenue, it would be east of it would it not?
A. Yes, sir.
Q. East of Garrison Avenue?

A. Yes, sir.
Q. Now, I will ask you whether or not any engine went into a side track that intersects the main track there about the Cotton Seed Oil Mill I have asked you about, and got a string of cars that night?
A. I don't exactly understand that.
Q. What I mean—I will ask you this question, (maybe you will understand it then) is there a side track or switch track between the main track and the Arkansas River that leads off from the Cotton Seed Oil Mill?
A. Yes, sir.
Q. I will ask you if there were any cars on that track that night?
A. There was some cars on the track.
Q. How many in number?
A. I couldn't say exactly.
Q. About how many?
A. I would say about ten or twelve cars.
Q. Now, I will ask you if your crew, just before Mr. Conarty was injured, if your crew or any party of your crew went into that track with your engine and got a string of cars?
A. I couldn't say.
Q. You were not present at the time?
35 A. No, sir.
Q. You don't know anything about it?
A. No, sir.
Q. State whether or not you saw a car loaded with coal, branded N O & N E 13239 that night?
A. I did.
Q. Where was this car when you first saw it?
A. When I first saw the car that night, what we call the "outside engine" had the car coming up the main track with it.
Q. What engine do you mean when you speak of the "Outside engine"?
A. The outside engine was in charge of foreman Hetherington, engine 2670. What we call the outside engine is the engine that does the outside work.
Q. Where was that as to the point where Conarty got injured?
A. When I saw the car it was about four blocks from where he was injured, when I saw the car.
Q. Was it before or after Mr. Conarty was injured?
A. I saw the car again after he was injured.
Q. Where was the car now, before he was injured?
A. It was in the cut that Hetherington had a hold of.
Q. When you speak of a "cut", what do you mean?
A. A cut of cars.
Q. How many cars were in this cut?
A. About twelve or fourteen, I don't know exactly how many.
Q. What direction and how far were they from where you were?
A. When I saw the car it was four or five blocks. It passed me between "H" and "I" street with the cut and Mr. Conarty was hurt between "E" and "F".

36 Q. How long was that before Mr. Conarty was hurt?
A. It was fifteen or twenty minutes, I should say.
Q. And in the cut of cars in which this coal car we speak of was a part, you say there were twelve or fourteen cars?
A. Yes, sir.
Q. I will ask you to state whether those cars were all empty or part of them empty?
A. Part loaded and part empty.
Q. What was Mr. Hetherington doing with that string of cars?
A. He had a hold of them with the intention of putting them in the rip track.
Q. Were they all bad orders?
A. Yes, sir.
Q. How many were loaded?
A. I couldn't say.
Q. Do you know what point the freight in the cars was destined to?
A. Both ways; east and west.
Q. Inside or outside of the State of Arkansas?
A. Some outside and some inside.
Q. And they were handling this number of cars about fifteen or twenty minutes before Mr. Conarty was injured?
A. I should say it was. It was between 12.15 and 12.45.
Q. What day of the week and month and year was it you saw this condition there?
A. I have got a little mixed on the date. I thought it was on the 13th at 12.45 when he was hurt, after midnight about forty-five minutes after midnight.
37 Q. Now, who was this man Hetherington you spoke of?
A. He was foreman of the engine.
Q. And did Hetherington work under your instructions?
A. He did.
Q. How come him ahold of this string of cars?
A. I instructed him to fill the rip track.
Q. Do you know from your own knowledge when this defective car branded N. O. & N. E. 13239 got into the yard?
A. No, sir.
Q. The record shows it got in on the 9th of November?
A. I had forgotten.
Q. Do you know where that car was on the 10th?
A. East No. 2 track.
Q. Where was that as to the track you got it off of, the night Mr. Conarty was hurt?
A. The same track.
Q. I will ask you to state whether or not it was mixed up with other cars at the time?
A. It was.
Q. And you say this coal car, the number of which slips my mind, was in a defective condition?
A. Yes, sir.
Q. Tell the jury which end of the car was defective and wherein it was defective?

A. It was defective in the west end.
Q. That would be the up the river end?
A. Yes, sir.
Q. In what way now was it defective?
38 A. The draw-bar was gone and the draft timbers were in a manner gone; they were damaged.
Q. When you speak of a "draw-bar" what do you mean?
A. A coupler.
Q. I will ask you to explain that to the jury. What do you mean by a coupler or draw-bar?
A. The coupler is the connection from one car to the other.
Q. Is it made of wood or iron?
A. Made of iron.
Q. State whether or not it was constructed like this (indicating), like what you call a "knuckle"?
A. Yes, sir.
Q. When those cars are in good fix so far as the coupler is concerned and so far as the draw head is concerned, what effect do they have to the moving of cars, as to coupling?
A. They couple automatically.
Q. You mean that when the cars come together they will couple themselves?
A. Yes, sir.
Q. That is when they are in good fix?
A. Yes, sir.
Q. You say the west end of this coal car, that is the up river end had no such thing as that in it at all?
A. No, sir.
Q. I will ask you to state whether or not the Frisco railroad had a rule or custom requiring a card of some kind to be put on a car when it was in a defective condition?
A. They have.
Q. What is branded or written on the card if anything?
39 A. The card is a form made for that purpose with "bad order" written across the top, across one end.
Q. How many of these cars in the cut of cars you say Mr. Hetherington had, how many of them were loaded with freight destined outside of Ft. Smith east of Ft. Smith and west of Ft. Smith, out of the State of Arkansas?
A. Well, I couldn't hardly answer that question.
Q. Your best estimate?
A. I should say there was at least four or five or probably six loads in the cut, for points outside of the State of Arkansas.
Q. That was destined to points outside of Arkansas?
A. Yes, sir.
Q. Now, Mr. Armstrong, where was this car the next time you saw it after you saw Hetherington with it?
A. The next time I saw it was after Mr. Conarty was hurt.
Q. Where was the car at that time?
A. It was standing just east of "F" street.
Q. On what track as to the main track?

A. On the main line track.

Q. What else further up of any kind was attached to this car at the time you saw it?

A. There was nothing else attached to it.

Q. How long have you been railroading?

A. Ever since I was twenty-one years old.

Q. And you are forty now. You have been railroading about twenty years?

A. Yes, sir.

Q. You say you have been railroading about twenty years?

A. Yes, sir.

40 Q. In what capacity?

A. Well, in different capacities. I started as a clerk in the office, then I went from there to switching.

Q. How long did you switch?

A. I switched altogether I should say about fourteen or fifteen years.

Q. How long have you been handling these couplers that will couple by impact that you speak of, and couple automatically?

A. Ever cince they have been in use.

Q. Just approximate the number of years?

A. Twelve years, I guess they have been using them.

Q. You know then what effect they will have if the couplers are in good shape?

A. Yes, sir.

Q. Suppose that an engine—I will ask you first if the locomotives that you had over there were equipped with couplers like those on the box cars?

A. They were.

Q. Were they such as would couple by the impact?

A. Yes, sir.

Q. Suppose a car loaded with coal, had a draw-bar in it that would couple by the impact or automatically and the engine had one on it that was in good fix and they were coming together at the rate of four or five miles an hour, what effect would that have when the engine struck the car?

A. They would couple.

Q. Tell the jury the space between the foot-board if there is such a thing, on the engine and the end of the car when they are coupled together?

41 A. Well, it is about two feet, I suppose.

Q. Room for a man in there then?

A. Yes, sir.

Q. Then I will ask you to state whether or not a switchman who was standing on the foot-board of the engine and the engine should run into a car and find it with a coupler intact and in good order and they come together at the rate of four or five miles an hour, you say they would couple?

A. Yes, sir.

Q. Would, he then have space in there to protect himself?

A. Yes, sir.

Q. Is that often done or not in your experience?
A. Yes, sir; it is often done.
Q. Now, what capacity was Mr. Conarty working in at the time he received the injury that cost his death?
A. He was a switchman.
Q. You say he was a switchman?
A. Yes, sir.
Q. Where was his post of duty as to the engine, Mr. Armstrong, please?
A. His post of duty was next to the draw-head on the right hand side on the foot board.
Q. Take the stand that you sit upon as being the front end of your engine and your feet representing the draw-head and this pedestal here the foot-board. I would ask you if that would represent the foot-board (indicating).
A. Yes, sir.
Q. And your feet then would represent the coupler?
A. It would.
42 Q. Then Mr. Conarty's post of duty was on the right hand side of that foot-board?
A. Yes, sir.
Q. For what purpose was he put there?
A. That is the post of duty for the man that follows the engine to couple and uncouple the engine from the cars.
Q. Is he required to stand there and can he stand there with a lift pin and lift the couplers to make the couplings?
A. Yes, sir.
Q. Was that the reason why he was put there?
A. Yes, sir.
Q. Can you tell the jury between the draw-head on the engine the coupling iron on the engine and the end of the coal car where they are in good fix and they come together and couple by the impact, there would be two feet for that man on the foot-board between him and the car couple on to, there would be two feet?
A. Yes, sir.
Q. There would be a space in here of about two feet? (indicating).
A. Yes, sir.
Q. Did you learn that night that Mr. Conarty had been injured by that coal car?
A. Yes, sir.
Q. What did you do then?
A. I phoned for the ambulance.
Q. Did you get up there?
A. I did.
Q. Did you see Mr. Conarty?
A. I did.
43 Q. Tell the jury where you found him, where he was when you got there?
A. He was lying on the ground with his head resting on the engineer's cushion.

Q. How far from this coal car?

A. From the side, five or six feet I suppose.

Q. Now tell the jury what the condition of this coupler on this engine was at that time, whether it was in good or bad condition?

A. Well, I didn't inspect the coupler on the engine.

Q. Had you been using it there that night?

A. The men had been using it; it was supposed to be in first class condition.

Q. And you supposed it was in first class condition?

A. I hadn't heard anything to the contrary.

Q. When you got to the engine did you make any inspection of the cylinder head or the steam chest, for blood or anything of that kind when you got there?

A. Didn't make any close inspection. I noticed it on there because they told me they took him off there.

Q. Where did you find the blood?

A. On the cylinder head.

Q. On the cylinder head and steam chest?

A. Yes, sir.

Q. State whether or not the steam chest is just above the cylinder head?

A. Yes, sir; it rests above the cylinder head bar; the cylinder head is below the steam chest.

Q. The cylinder head, I will ask you if it extends beyond the steam chest?

44 A. Yes, sir; about three inches, I suppose.

Q. You found this blood on the front end, did you, on the cylinder head and of the steam chest?

A. Yes, sir.

Q. Did you find anything else in the way of flesh?

A. No, sir; I didn't make any close inspection.

Q. Ask you if you examined the coal car?

A. Only give it a passing inspection.

Q. I will ask you to state whether or not there were any bolts like stay bolts or truss-rods protruding from the end of that car?

A. There was a few.

Q. What size were they, Mr. Armstrong?

A. Five-eighths bolts, I should say, something of that sort.

Q. Did they protrude from the end of the car?

A. Yes, sir.

Q. And about how many inches?

A. I don't know; where the timber had been torn off — sticking out I should say an inch or so; some of them might have been longer than others.

Q. Which cylinder did you find this blood on, the side where Mr. Conarty was expected to stand?

A. On the right hand side?

Q. On the side where he was expected to stand?

A. Yes, sir.

Q. Ordinarily in the yards, from your experience as a switchman, about how fast—I mean how slow—would an engine be moving in order to make the coupling by the impact or automatically?

45 A. Ordinary coupling?

Q. Yes, sir.

A. Oh: about one mile an hour, I guess.

Q. Moving that slowly, it would couple if everything was in good condition.

A. Yes, sir.

Q. Then, if it was going four or five miles an hour what effect would it have?

A. It would still couple.

Q. Suppose there had been a draw-bar in the end, based on your experience, and it come together four or five or six or seven miles an hour, although the coupling apparatus was so it would not couple automatically and there was a coal car on the main line, what effect would it have on the car?

(Objected to by defendant's counsel.)

The COURT: Let him answer.

Q. What effect would it have, Mr. Anderson?

A. If the knuckles were both closed, the car would re-bound.

Q. You mean by that the car would move on the rails, move away from the end of the engine?

A. Yes, sir.

Q. And leave space in between the end of the engine and the end of the car and foot-board so that a man would be safe on the foot-board?

A. Yes, sir.

To the admission of which defendant excepted.

46 Cross-examination by Mr. DAVIDSON:

Q. Mr. Armstrong, how many repair tracks have you in the yard there for making repairs?

A. We have now —.

Q. Did you at that time?

A. We had three at that time.

Q. Now, did you frequently have a number of bad order cars that could be accommodated on those tracks?

A. Yes, sir.

Q. Did you have any place to store those when the repair tracks were full?

A. We stored them in the east end of the yards; used the east end of the yards for that purpose.

Q. At what time did you draw the cars from the repair tracks after they had been repaired?

A. Any time between seven and twelve o'clock, p. m. no special time.

Q. Why did you take that time to draw cars?

A. Because the men worked all day. The cars are not turned over to us until six, p. m. We have no business in the repair tracks until after six. p. m.

Q. Why do you postpone it until after six?

—. ——.

Mr. DAVIDSON (continuing):

Q. If I remember correctly, you stated that these were all bad order cars?

A. Yes, sir.

Q. They were standing on the track where you stored that
47 kind of bad order cars awaiting the repairs?

A. They were.

Q. You had three tracks on which repairs were done and they were full of bad order cars that were being repaired when this was brought in?

A Yes, sir.

Q. State whether you had any of these cars that night in those tracks?

A. Yes, sir.

Q. Now, in removing these bad order cars, was it necessary to move them in the manner you have stated?

A. It was.

Q. In order to transfer them to the repair track?

A. Yes, sir.

Q. Just describe to the jury how that bad order car was removed?

A. Well, this car, the west end of this car being out of commission, you might say, no draw-bar or draft timber in it; as I stated before, it was stored with other bad order cars until such time as it would admit those cars being put into the rip, by others being repaired. As near as I can remember, there was about fifteen or eighteen cars O. K'd. in the rip track that night. The engine went down to get these twelve or fourteen cars to bring up and put in the place of those that had been O. K'd., that is, that had been repaired, during the day. The west end of this car being out of commission, it was set out first and then the others picked up and coupled to the good draw-head, shoved up the main line and it was cut off on the main line and left in order that it could be handled separately
48 by itself, and it was put into the end of the riptrack by running around the entire cut, that is the only way it could have been handled. If you had gone to the west end where this bad order car was, it could not have been handled, of course it had to be handled separately, so we took the cars with the good draw-head in it and put them in the rip track first and we were in the act of going back after this one without the draw-head when the other engine came down the main line and struck it. We were about five blocks from the car that we intended to get when the engine that Mr. Conarty was working on struck the car.

Q. Mr. Conarty and his crew had been working where?

A. What we call the lead engine. They make and brake trains. They had been working in the same end of the yards that this engine was working in. They had occasion to go to the west end of the yard.

Q. Do they work there frequently together?

A. Oh: yes.

Q. Do both use the main line in switching?

A. They cannot both use the main line at the same time, but one

engine, as a rule when one engine has got its duty to perform, the other one has business in the other end of the yard to keep out of its way.

Q. Was this particular engine detailed to work at that place at that time?

A. It was. That is a part of its duty.

Q. Did the other crew know that?

A. Yes, sir.

Q. Was it customary for them to use the main line when they were working the rip track?

A. Yes, sir.

Q. They had to in order to work the rip track?

49 A. Yes, sir.

Q. Was there any rule to protect you gentlemen in working there with reference to trains coming in off the main line?

—. ——.

Mr. DAVIDSON:

Q. The engine was going down to get this car and was moving in that direction for the purpose of taking this car to the rip track, was it, at the time of the accident?

A. Yes, sir.

Q. How far was it from this car?

A. It was about four or five blocks, I should say.

Q. And going that direction to get it?

A. Yes, sir.

Q. Now, did the other crew have anything at all to do with handling this car?

A. Not a thing, no, sir.

Q. They were not required to couple onto it or handle it in any way?

A. No, sir.

Q. It wasn't in the course of their work to do that?

A. No, sir.

Redirect examination by Mr. CHEW:

Q. Mr. Armstrong, the place where the collision between this defective car you speak of and the engine, was up there about a street crossing, about the Oil Mill, wasn't it?

A. About the west end of the Oil Mill.

Q. Will you be kind enough, please, to state how far it was west of the switch that went into the side track between the main track and the river, there at the Oil Mill?

A. I can tell you as near as I can. The switch that goes into that track is half way between "G" and "H" street and this

50 happened about, I should say, two or three car lengths east of "F" street or "E" street it is.

Q. How many feet—we don't mean for you to tell the exact inches or feet—but your best estimate?

A. Well, I should say 250 yards.

Q. West, now of this switch I speak of?

A. To where the accident occurred.

Q. That is the accident occurred at a point 250 yards west of the switch I have asked you about?

A. Yes, sir.

The COURT: West is toward Fort Smith?

A. Yes, sir.

Q. Up toward Garrison Avenue?

A. Yes, sir.

Q. Now, how far from the point where you say the collision took place was it back to the repair tracks you call it rip, but I will call them repair tracks, I believe you stated it in blocks?

A. From the switch you mean to the repair tracks?

Q. I mean from where the car stood at the time the engine ran into it, and caused Mr. Conarty's death?

A. Well, let's see, it is about 150 yards further; it would be about 300 yards, I suppose from where the accident occurred to the entrance of the repair track as near as I could guess at it.

Q. You mean about 400 yards?

A. Yes, sir.

Q. From the point of collision between the engine that Conarty was on, with the car, back to the mouth or entrance of the repair track, 400 yards?

A. Yes, sir.

51 Q. How far would the car have to go in on the repair track in the condition it was in that night, before it would clear at the clearing post?

A. It would have to go in about eight car lengths which is about 250 feet.

Q. Then 400 and 250 would make 650 yards, 400 yards and 250 yards 850 yards?

A. Yes, sir; about that.

The COURT: About 850 yards?

Q. From the point of collission to where the car would have been cleared on the repair track?

A. Yes, sir.

Q. Will you be kind enough please, to tell the jury how far this car was—when I speak of this car I mean the coal car—how far was it or how far had it been moved up to the time that the collision took place, that is up to the time it got to the spot where the collision took place?

A. About three quarters of a mile.

Q. In moving it this three quarters of a mile, did you move it on the main line?

A. From the side track on the main line, yes, sir.

Q. Then, it was about three quarters of a mile, was it, from the point of collision to where you get onto this coal car that was loaded with coal?

A. Yes, sir.

Q. And you had moved it three quarters of a mile down the main line track before the collision took place?

A. Yes, sir.

Q. I will ask you whether or not, in moving this car three quarters of a mile, you had passed the rip track with this car?

52 A. We had.

Q. And had passed it from the mouth you say about 400 yards?

A. Yes, sir.

Q. Why was it necessary to pass this switch 400 yards up there before you stopped this defective car?

A. Because it was twelve cars next to the engine. The engine was on the east end of the cut; the car was on the west end of the cut.

Q. And was coupled to the west end of the cut of cars?

A. It was the extreme west car of the cut we were handling.

Q. And the east end was coupled to the west end of this cut of cars?

A. Yes, sir.

Q. The defective end was on the end to which Conarty came into that caused his death?

A. Yes, sir.

Q. When you got this car there you uncoupled it did you?

A. Yes, sir.

Q. What did you do with the cut of cars?

A. Put them into the repair tracks first.

Q. Then you had to travel about 400 yards before you could——

A. We had to back up the main line in order to let a freight train out that had just headed into this switch I just spoke about, the scale track is a continuance of the Oil Mill track that you spoke of.

Q. You backed up this far to let a freight train out?

A. Yes, sir.

Q. What direction——

A. The freight train had come from the east and we shoved up the main line in order to let their engine out because they had to use the same line to go to the roundhouse.

53 Q. I will ask you if that engine that you were getting out of the way of, if that engine had brought in a train from St. Louis or outside of the State of Arkansas?

A. It had brought in a train from Monette, Missouri.

Q. And you were getting out of the way for that engine to pass down and go into a side track in order to get into the roundhouse?

A. Yes, sir.

Q. Mr. Armstrong, you spoke about being in the west yard. How far did he have to go, how far did Mr. Conarty have to go with this engine and his co-workers, Mr. Daniels and the other gentleman, Mr. Douglass, how far did he have to go with them to do his work in the west yard?

A. About "C" street.

Q. Don't call streets, just give us the distance, mile or quarter mile or the different distances it was?

A. Well, you might say a quarter of a mile.

Q. A quarter of a mile west of where the point of collision was?

A. No, it wasn't over 150 yards from where the point of collision was, but where he was working.

Q. What was he doing up there?

A. They had cleared the track below in the east yards. There was one clear track in the west yards we had to block in order to make up the merchandise train 35.

Q. Do you mean a freight train?

A. Yes, sir.

Q. You were making room for that 35 train?

54 A. Yes, sir.

Q. Is 35 and interstate train?

A. Yes, sir.

Q. And bound for what point?

A. Texas.

Q. When Mr. Conarty went off down in the west end, that is below, down in the west end of the yard, for what purpose had he gone down there, what character of cars was he handling?

A. Good order cars.

Q. What character of cars as to being empty or loaded?

A. Well, as near as I can remember they were box car loads of merchandise.

Q. They had come into Fort Smith for delivery at Fort Smith?

A. Not altogether.

Q. Was he spotting any cars down there for delivery to the owners of the freight in Fort Smith?

A. No, sir.

Q. What was he doing?

A. He was clearing the track in the east yard in order to make room for the Texas train.

Q. Now, this was on the night of the 12th, I mean the night of the 13th and morning of the 14th, I should say, it was 12:45?

A. Yes, sir.

Q. Was it Saturday or Sunday?

A. I think it was Saturday.

Q. Saturday?

A. Saturday night, yes, sir, I am not sure.

Q. I will ask you by way of refreshing your memory if it wasn't Sunday morning, he was carried over to the hospital?

55 A. Yes, sir.

Q. And he was hurt then about 12:45 Sunday morning?

A. Yes, sir.

Q. That was on the morning of the 13th. I will ask you to state on the track from which you got this defective car that was loaded with coal, were there any cars on there except cars that had been marked bad order?

A. Well, I don't think so.

Q. What is your best recollection?

A. My best recollection, that track was entirely full of bad order cars.

Q. Was that track used at any time for any other purpose?

A. Yes, sir; at times when we didn't have it used for that pur-

pose; that we didn't have a surplus of bad order cars it would have been used for storage or for any other commodity we might have had there.

Q. That was a track that was used interchangeably?

A. If we had an accumulation of bad orders, we would have to give up the track at times to accommodate these bad orders, we cannot get into the repair track; that track was used for that purpose at that time.

Q. From where you got this car you had moved it three quarters of a mile up to the point on the main line where the collision took place?

A. Yes, sir.

Q. And could have moved it 300 yards further if it hadn't been for this engine having to go into the roundhouse?

A. Yes, sir.

56 Recross-examination.

By Mr. DAVIDSON:

Q. You kept the bad order cars separate and when your tracks were full then you used this as a storage track?

A. Yes, sir.

Q. Did you mingle those with the other cars?

A. No, sir, we kept them separately.

Q. You used that then for that purpose when you had a surplus of bad order cars?

A. Yes, sir.

Q. In pulling that track, that storage track, did you go any further east than necessary to clear and bring the cars out?

A. That's all.

Q. Then you went far enough west so as to be able to clear the track before you pulled the others down?

A. Yes, sir.

Q. You were doing that in the usual and ordinary way of switching in that yard?

A. Yes, sir.

Q. You had been doing that way for years?

A. As long as I had been there.

Q. You could not have handled the bad order car in any other way?

A. No, sir, there was no other way to handle it.

Redirect examination by Mr. CHEW:

Q. This happened, the injury to Mr. Conarty happened about 12:45 on the morning of the 13th, we all agree upon that?

A. Yes, sir.

57 Q. And it was what we call ordinarily Saturday night. Now what was the condition of this track you speak of all day Saturday, how many cars were on it that you got this coal car off of?

A. Well, I couldn't say because I didn't work only at night you know and I didn't count the cars in it.

Q. Go back to Friday night; did you count the cars Friday night?
A. No, sir, I know there was a surplus of bad order cars.
Q. Did you get any off of there Friday?
A. I think so; I am not sure though; we had quite a surplus there and we generally put the bad orders in, what we call bad orders.
Q. You took them in the order in which they came in?
A. Yes, sir.
Q. Did you pass the switch that led from the main track into the repair track more than once with this car?
A. No, sir; just pushed up the main line.

Witness excused.

58 *Testimony of W. J. Daniels.*

W. J. DANIELS called as a witness on part of plaintiff, after having been first duly sworn, was examined in chief by Mr. Chew, and testified as follows:

Q. Mr. Daniels, I believe W. J. Daniels is your name?
A. Yes, sir.
Q. About how old a man are you, Mr. Daniels?
A. Twenty-eight years past.
Q. You live at Fort Smith, do you?
A. Yes, sir.
Q. How long have you lived at Fort Smith, Mr. Daniels?
A. About twenty years.
Q. Been raised there then?
A. Practically so, yes, sir.
Q. What is your occupation and what was it in November 1910?
A. I was employed as switchman.
Q. In the yards of the Frisco railroad at Fort Smith?
A. Yes, sir.
Q. How long have you been working there, Mr. Daniels?
A. Well, I went to work there the 26th day of July, 1910.
Q. You had worked there then from July up to November when this matter occurred?
A. Yes, sir.
Q. Had you worked anywhere else except there in Fort Smith?
A. I have had about eleven years' experience.
Q. As a switchman?
A. Yes, sir.
Q. Now, did you know a man by the name of W. G. Conarty that was over there?

59 A. Yes, sir.

Q. I will ask you to state whether or not you worked with him from July to November there in the yards of the Frisco railroad?
A. Yes, sir.
Q. Were you a member of the night crew, Mr. Daniels?
A. Yes, sir.
Q. Was Mr. Conarty a member of the night crew?

A. Yes, sir.

Q. I will ask you to state whether or not you were on the engine just at the time or just before the time Mr. Conarty got injured there that night?

A. I was.

Q. Now, who else was with you besides Mr. Conarty?

A. S. A. Douglass.

Q. Now, at the time Mr. Conar-y got injured, I will ask you to state whether or not he was at his post of duty?

A. Yes, sir, he was.

Q. Where was his post of duty, Mr. Daniels?

A. On the foot-board.

Q. Near the draw-head or not?

A. Yes, sir, next to the draw-bar.

Q. Now, where was your post of duty?

A. On the left side of the foot-board.

Q. And which side of the draw-bar was Mr. Conarty's post of duty?

A. On the right side.

Q. And Mr. Douglass, I believe you said was employed with you?

A. He was the engine foreman.

Q. Where was his post of duty?

A. On the foot-board; on the right side.

60 Q. Then what direction was the engine moving in the yards at the time this injury occurred?

A. Moving north.

Q. That would be coming, then, in this direction toward Van Buren would it?

A. Yes, sir.

Q. Now, Mr. Daniels, just before this injury to Mr. Conarty occurred, where had this engine that you and Mr. Conarty and Mr. Douglass were with, where had it been and what had it been doing?

A. We had been up to shift some cars in the city track to the best of my knowledge.

Q. What kind of cars?

A. Freight cars.

Q. Were they loaded or empty cars?

A. I suppose they were loaded.

Q. Where did you put them?

A. In what is known as the "City track" or "Team track."

Q. What purpose were they put there for?

A. The city loads; they were put there to be unloaded to be delivered wherever they belonged.

Q. How many cars had you carried up there?

A. I couldn't say.

Q. Do you know where these cars came from?

A. They came into Fort Smith on different trains.

Q. From what direction?

A. Why, from the north.

Q. You didn't see the billing of them?

A. No, sir.

Q. Did they come in on local or through freight trains?
61 A. Well, I suppose they came in on both.
Q. Local and through trains?
A. Yes, sir.
Q. After you had spotted these cars you and Mr. Conarty and Mr. Douglass, what did you do then?
A. Why, we came out of the city track and came down the main line.
Q. Is that city track south or west of Garrison Avenue, up the river?
A. Why, it is north of Garrison Avenue.
Q. North of Garrison Avenue?
A. Yes, sir.
Q. Between Van Buren and Fort Smith?
A. Between Van Buren and Garrison Avenue.
Q. What end of the city track were you on?
A. Why, we were on the north end; there is only one entrance to the city track, they are all spur tracks, there is only one way to get into them, from the north end.
Q. I will ask you to state this—the locomotive engine that you gentlemen were using there—I will ask you to state whether or not that engine in the yards there handled interstate commerce, that is cars that came in from other States?
A. Yes, sir.
Q. For what purpose?
A. For making and breaking up trains.
Q. Now, at the time that you gentlemen had started back out of the city track, what was your intention and what did you start back to do?
A. To make up 735.
Q. What do you mean by 735?
62 A. That is the freight train, fast run, fast merchandise run.
Q. Between where?
A. Why, between St. Louis and Paris, Texas, I believe.
Q. St. Louis, Missouri, and Paris, Texas?
A. Yes, sir.
Q. Had that train 735 come in that night?
A. Yes, sir.
Q. Did you notice the engine that brought it in there that night; did you see it?
A. Yes, sir.
Q. Where was it when you first noticed it?
A. On what is known as the "scale track."
Q. When you gentlemen started back over the track did your engine go out on the main line?
A. Yes, sir.
Q. What now, if anything occurred while you were moving along the main line track and what direction were you moving?
A. We were moving north.
Q. Toward Van Buren?

A. Yes, sir.

Q. Mr. Daniels, in your own way, tell the court and jury what occurred, if anything?

A. We were moving north on the main line coming from the south end of the yard or from the city track as I have stated and we collided with a loaded coal car standing on the main line.

Q. Main line track?

A. Yes, sir.

Q. Now, did you hear Conarty say anything to you or to Mr. Douglass just before the collision?

63 A. He says "there is a car."

Q. What else, if anything, did you have on the engine or locomotive?

A. The head light.

Q. What else?

A. Well we had our lamp.

Q. A signal light.

A. Yes, sir.

Q. Was the headlight making a brilliant light?

A. Yes, sir, it was very light.

Q. Now, how close do you think you were to this car when Mr. Conarty says "there is a car on the track"?

A. Well, the best of my knowledge it was probably fifty five or sixty feet.

Q. About a car length and half or two car lengths?

A. Something like that, yes, sir.

Q. When Conarty says "there is a car on the track" what did you do?

A. I stepped off.

Q. About how wide is that track; is that a standard track four feet, eight and a half inches?

A. Yes, sir.

Q. Where were you riding, over the rail or on the outside of the rail?

A. Well, just about over the rail.

Q. You were riding on the foot-board just about over the rail?

A. Yes, sir, on the east side.

Q. Then, all you had to do was to just step down?

A. Yes, sir.

Q. You would not have stepped into the middle of the track?

64 A. No, sir.

Q. Where was Mr. Douglass standing?

A. He must have been about where I was; at the same place I was on the foot-board; just about over the rail, I suppose.

Q. When Mr. Conarty was at his post of duty, where was he as to the track?

A. He was in the middle of the track.

Q. Mr. Douglass, then was between Mr. Conarty and the end of the foot-board?

A. Yes, sir.

Q. And you would have been between the end of the board and Mr. Conarty?

A. If I had been where Douglass was you mean?

Q. Yes,

A. I wasn't between Mr. Conarty and the end of the footboard; I was on the other opposite side of the draw-bar from Mr. Conarty.

Q. You would have been between your end of the board and Mr. Conarty?

A. Yes, sir.

Q. And Mr. Douglass was between his end of the board and Mr. Conarty?

A. Yes, sir.

Q. Is Mr. Douglass here?

A. He is down stairs.

Q. Now, when this collision took place, what effect, if any, did it have upon Mr. Conarty?

A. Well, after the accident taken place I went around to the front of the engine and Mr. Conarty was lying there across the pilot beam.

65 Q. At the front end of the engine?

A. At the front end of the engine. His shoulder was laying, if I am not mistaken, his right shoulder was laying on the cylinder and the side of his face was on the steam chest.

Q. Was that steam chest hot at the time?

A. It is warm.

Q. When you speak of the pilot beam you mean the big piece of timber across the track in front of the engine?

A. Yes, sir, the foot-board that the pilot of the engine is attached to.

Q. Now, suppose we take the seat you are occupying, Mr. Daniels, as the engine and this was a foot-board, (indicating) put your feet right out here just a minute, about there. Take your feet here representing the coupler on the engine and the cylinder head would be here on one side and cylinder head over here would it, on that side. Mr. Conarty's position or post of duty was on the right hand side of this coupler?

A. Yes, sir.

Q. If this was the foot-board (indicating) it would be right over here.

A. Yes, sir.

Q. Why was his post of duty here, why did he ride there?

A. He rode there because that was his place on the foot-board.

Q. For what purpose?

A. For the purpose of performing his duty.

Q. Was it necessary that he should ride there to make couplings and see that the couplings were made with cars?

A. Yes, sir, always ride on the end of the engine that you are working with.

66 Q. And about how far did that coupler on the engine protrude or extend over the foot-board, Mr. Daniels, if any?

A. Well, I suppose, I couldn't say for sure because I don't really know but I suppose it extends, I suppose two feet or something near

that from the pilot beam it was attached to -ver the foot-board, I couldn't say because I don't know.

Q. You say about two feet over the pilot beam?

A. Yes, sir.

Q. Now, about how fast and what rate per hour do you think you were traveling, that this locomotive was moving at the time you were approaching this car before Mr. Conarty got hurt?

A. To the best of my knowledge we were moving six or seven miles an hour.

Q. When the exclamation was made upon the part of Mr. Conarty "there is a car on the track," I will ask you to state if any signal was given to the engineer?

A. Yes, sir.

Q. Who gave that signal?

A. Mr. Douglass.

Q. What effect did that signal have on the movement of the engine as to slackening it if it did?

A. It didn't have any effect at all on the movement of the engine; it had effect on the engineer to set his brakes.

Q. Did that reduce the speed of the engine at that time?

A. Yes, sir.

Q. Now, about how fast do you thing the car was moving at the time the collision took place between the engine and the car—the engine, I mean—at the time the collision took place between the engine and the car, you say you were approaching it there some five or six miles an hour; how fast was it going when the impact
67 took place?

A. I really don't know.

Q. The speed had been reduced though some?

A. Oh, yes quite a good deal but I couldn't say how fast it was moving at the time it collided with the car.

Q. How many feet do you think it had traveled from the time that the brakes were applied by the engineer until the impact of the collision took place.

A. Well, they traveled about the length of an engine and tank.

Mr. DAVIDSON: After they discovered it?

Mr. CHEW: No, he said after they set the brakes.

Q. Now, after you found Mr. Conarty, as you stated, with his face upon the steam chest and his arm up on the pilot beam, what was done with him, with his body?

A. Why, Mr. Douglass and I lifted him off the pilot beam and cylinder and the fireman came down with a small cushion that he had on his seat box, and we laid him down on this cushion.

Q. What was Mr. Conarty's condition at that time as to blood coming from his body?

A. Well, he was bleeding very freely at the mouth.

Q. Any other place?

A. Why he had several holes punched in his leg.

Q. Which of his legs was it that the holes were punched in?

A. If I am not mistaken, I believe it was his left leg, the only one I noticed.

Q. Could you tell what it was that punched holes in his leg or did you notice anything?

A. I never noticed particularly, but the only thing,—it must have been the bolts in the car.

Q. How many and to what extent were the holes punched
68 in his left leg?

A. Well, they were punched in there—looked like they had been punched in there with a bolt or something.

Q. Were his wounds bleeding any?

A. Why, some, yes, sir.

Q. Now, did you examined Mr. Conarty's jaws or his face after you laid him down?

A. No, sir.

Q. Did you examine his head?

A. No, sir.

Q. Did you examine anything there to tell whether there were any broken bones?

A. I just help pick him up; Mr. Douglass and I picked him up and I went down to the yard office to the telephone and by the time I got back up there the wagon was there.

Q. The ambulance?

A. Yes, sir, and I didn't examine him at all.

Q. To what extent was this blood please, Mr. Daniels, on his face or coming out of his mouth, to what extent——

A. When we picked him up off the pilot beam or cylinder he was bleeding very freely at the mouth, running in a stream from his mouth.

Q. Did you notice any evidences of blood on the cylinder or steam chest?

A. No, sir, I didn't; in fact, I didn't look for it.

Q. Did you examine the west end of this car that you speak of; did you examine that for bolts or anything of that kind?

A. I only seen there was no draw-bar in the car.

Q. Did you notice any bolts that would make these wounds in his leg?

A. There was some bolts there, yes.

69 Q. In the end of the car?

A. Yes, sir.

Q. How far did they extend out from the car, Mr. Daniels?

A. That, I couldn't say; probably an inch or an inch and a half, something like that.

Q. Just the bolts left there after the timbers were pulled down?

A. I can't call the name of the bolt but it was a bolt that runs from one end of the car to the other. It is not a truss rod; it is something similar to the truss rod; it runs from one sill end of the car to the other sill end of the car. I think that was the bolts I seen. It wasn't bolts connected with the draft rigging whatever.

Q. What, if anything, was in this car that you say had the draft timbers and the draw-head pulled out of it?

A. Why, it was loaded with coal.

Q. It was a coal car then, was it?

A. It was a coal car, yes, sir.

Q. Did you notice the brand of that car?
A. Initials, you mean?
Q. Yes.
A. It was N. O. & N. E.
Q. Do you remember the number?
A. No, sir.
Q. Would you remember it if you heard it called?
A. I don't believe I would.
Q. 13239?
A. I don't remember whether that is the number of it or not.
Q. Is that the car that you understood was loaded with
70 coal to go to Paris, Texas?

The COURT: There is no controversy about that; no use taking up time with that.

Q. Mr. Daniels, you say you have been switching about fourteen years?
A. Yes, sir.
Q. How long have you been handling these couplers and been familiar with the operation of these couplers that couple by the impact or automatically?
A. For about eleven years.
Q. I will ask you to state if your engine had that kind of a coupler on it?
A. Yes, sir.
Q. What condition was it in?
A. Good condition.
Q. Now, what effect and what would have been the result if this coal car had have had a draw-head in it——

Mr. DAVIDSON: I don't think that is competent.
The COURT: You may save your exceptions.

Q. What effect would it have had, if this coal car had have had a draw-head in it that was in good order, what effect would that collision have had there as to coupling onto the coal car, the engine coupling onto it?
A. I don't believe it would have had any effect.
Q. Would it have coupled to the coal car if the coupler on the coal car had been in good condition?
A. If the end knuckles were open, yes, sir.
Q. Suppose the knuckles had been closed?
A. It would only have shoved the car away from the engine.
71 Q. When it struck?
A. Yes, sir.
Q. When the cars are coupled to an engine with these automatic couplers by impact, if this coal car had been coupled to your engine that way, how much space would there have been from the footboard to the end of the coal car?
A. I suppose there would have been three feet—three and a half feet, probably four feet in some cars. On some cars the draw-bar sticks out further than the others.
Q. And where, from two to four feet?

A. Yes, sir.

Q. I will ask you to state from your experience now as a switchman, if couplings are made with brakemen or switchmen standing on the foot-board, with coal cars and box cars in the yards?

A. Yes, sir; they are.

Q. Is that a frequent or infrequent occurrence?

A. Frequent occurrence.

Q. Is it an every day occurrence?

A. Yes, sir.

And over objection of defendant the following evidence was admitted.

Q. Now if this engine had been traveling at the rate of five or six miles an hour and come in contact with that coal car there and the knuckles had been open, you say the effect would have been to couple onto the coal car, that is if the coal car had been equipped with a draw-bar in good condition?

A. Yes, sir.

Q. If the knuckles had been closed, it would just simply *of* pushed the coal car out of the way and give more space between the engine and coal car?

72 A. Ordinarily, yes, sir.

To the admission of which defendant excepted.

Q. What character of man was Mr. Conarty, Mr. Daniels, as to industry and energy?

A. Good.

Q. Did he appear to be a man of ordinarily good health to you, or not?

A. Yes, sir.

Q. And an energetic man you say?

A. Yes, sir.

Q. Were you ever about his home any, Mr. Daniels?

A. No, sir.

Q. You were not?

A. No, sir.

Q. You don't know of your own knowledge where this car came from, do you, this coal car?

A. No, sir.

Q. Do you know where it came from in the yard that night?

A. I couldn't say.

The COURT: I think there is no controversy about that.

Q. I don't suppose it will be disputed, but had you any knowledge, when you and Conarty and Douglass went down to the city tracks, had you any knowledge that that car was going to be put on the main track?

A. No, sir.

Q. I will withdraw that question. About how many cars was in this train 735, if you know?

A. I couldn't say. I don't know.

73 Cross-examination by Mr. DAVIDSON:

Q. Mr. Daniels, you had been working in the city yards had you?

A. Yes, sir.

Q. You knew that this other engine and crew were up there pulling the repair tracks?

A. I knew they were in that end of the yard; I didn't know what they were doing but I knew that engine was in that end of the yard.

Q. You knew those tracks were pulled every night?

A. Yes, sir.

Q. In pulling thos- tracks, it is necessary to draw those cars out on the main line, is it not?

A. Yes, sir.

Q. You speak of the running board or foot board on the front of the engine. It is how wide?

A. Well, I suppose it is about a foot wide, probably a little more; maybe sixteen inches; between a foot and sixteen inches.

Q. The rails are four feet, eight inches apart?

A. Yes, sir.

Q. How much does the coupling—how much space does the coupling on your engine occupy?

A. You mean attached to the pilot beam?

Q. Yes.

A. I suppose it is two feet. You mean where the draw-bar is attached to the pilot beam?

Q. How wide is it where you stand on each side?

A. Why, it is about three feet, probably a little better; three and a half probably.

Q. The draw-bar itself is how wide?

A. It takes up a space of about a foot and a half or two
74 feet, something like that.

Q. Two feet. If you were standing over the outside rail that would leave less than two feet on each side?

A. Yes, sir.

Q. The one that is standing on the inside was only about two feet further from the outside than the man that stood next to him; just one step?

A. Yes, sir.

Q. You had started from that yard to go up there switching 39 had you not?

A. 735.

Q. That was a train that was coming in?

A. Yes, sir, from the north.

Q. You had no thought of handling this car on the main line?

A. No, sir.

Q. You had nothing to do with that, did you?

A. No, sir.

Q. Was the headlight of the other train shining in your face?

A. Yes, sir.

Q. Was that what blinded you?

A. Yes, sir.

Q. But for that you — have seen that coal car a good deal further away?
A. I think we would, yes, sir.
Q. When you saw it—who was the first one to see it?
A. Mr. Conarty.
Q. Did he speak promptly?
A. Says "There is a car", yes, sir.
Q. Did you at once step off?
A. Yes, sir.
75 Q. Did he have time to step off?
A. Well, he had about forty-five or fifty feet.
Q. How far did you get before you stepped off?
A. Five or six or ten feet.
Q. And the engine was getting slower all the time as it went toward the car?
A. Yes, sir.
Q. Why did you step off?
A. Because I seen the car didn't have no draw-bar in it.
Q. Didn't you see you were going to collide with it?
A. Yes, sir; I thought so anyway. I thought it strong enough to get off.
Q. Mr. Douglass did also did he?
A. Yes, sir.
Q. Mr. Daniels, you say men stay on the foot-board and couple cars; don't those cars couple without the brakemen having anything to do with it?
A. Sometimes; they are supposed to be automatic couplers, yes, sir.
Q. And your duty don't require you to stand there to make couplings?
A. No, sir.
Q. You are not required to stay on the foot-board to couple at all?
A. No, sir.
Q. Those couplers couple by impact and you don't have to go between the cars nor to stay on the foot-board to couple or uncouple?
A. No, sir.
Q. Was there any duty that required Mr. Conarty to stay
76 there to couple the car they were colliding with?
A. No, sir.
Q. Was it very apparent that you were going to collide with the car?
A. Yes, sir.
Q. Did you see Mr. Conarty make any attempt at all to step off?
A. No, sir.
Q. When the locomotive passed you what point of the locomotive were you at or how near were you to it after it run past you?
A. After it collided with the car?
Q. Yes, sir.
A. I was standing at the rear foot-board; that would be the length of the engine and tank; I suppose about fifty feet.
Q. Then it ran fifty feet after you stepped off?
A. Yes, sir.

A JUROR: Didn't you state a-hile ago it was his duty to stand there to do the coupling on that engine?

A. I said it was his duty to be on the foot-board.

Q. What he was there for was to couple with the other cars?

A. We were going from the city yards down there and you either have to be on the foot-board or up in the engine to ride.

Q. This coupling bar, does it lie down on the cow-catcher or does it extend up above it?

A. Extends up above; it is stationary.

Q. It is on a level with this other car?

A. It is the standard height.

Mr. DAVIDSON (continuing):

Q. On this occasion, what did you get on that foot-board for?

A. To ride down the yard.

Q. You were just simply going to ride from where you
77 were down to the other part of the yard?

A. Yes, sir.

Q. Was there any duty that required you to be on that foot-board to couple?

A. No, sir.

Q. You were not contemplating coupling onto any car until you went up to get this other train, were you?

A. No, sir.

Q. Then the train was facing you. Were you going still to the other end of that train?

A. No, sir.

Q. You were going to wait for the engine to pull off?

A. Get the engine out of the scale track and get a hold from the south end.

Q. How far was that engine from you?

A. Well, I suppose it was 400 yards.

Q. When you saw that engine, and Mr. Conarty called your attention to the car, why did you step off?

The COURT: He said a while ago he thought they were going to collide with the car.

The WITNESS: I believed we were going to collide with that car and I stepped off for safety.

Q. You spoke of the bar going through the length of the car. Had that anything to do with the coupling?

A. No, sir.

Q. That projected from the injured car?

Mr. CHEW: The bolt you mean?

The WITNESS: Went through from one end sill to the other through the body of the car, they are put in there to hol- the end sill at each side.

78 Q. That is the rod you spoke of that projected out there?

A. Yes, sir.

Q. You spoke of the coal car being brought in there; you said you understood it was brought from down at Jenson?
A. Yes, sir.
Q. Did you understand it was brought there for heavy repairs?
A. Yes, sir.
Q. Such heavy repairs as they did there at Fort Smith?
A. Yes, sir.

Redirect examination by Mr. CHEW:

Q. Mr. Daniels, you were not on that foot-board for fun were you?
A. No, sir.
Q. You were required to be there?
A. Yes, sir.
Q. And so was Conarty?
A. Yes, sir.
Q. Wasn't Conarty required to stand so if the coupling should not work, if the knuckles were not open he could raise the pin so the coupling would be made?
A. You are not supposed to do it.
Q. Didn't you do it?
A. It is done.
Q. And that is what he was there for to see that that knuckle was open?
A. Yes, sir, that is what he was put there for.

79 Recross-examination by Mr. DAVIDSON:

Q. Are you not forbidden to go between the cars to see about the coupling?
A. While in motion, yes, sir.
Q. Your duties do not require you to go between the cars while they are in motion to open the knuckles?
A. No, sir.
Q. And they do not, under any circumstances, require you to go between the cars while they are in motion?
A. No, sir.
Q. Provision is made by which you can do that without going in there?
A. Either that or stop the engine.
Q. You were simply on that foot-board for the purpose of riding from one point of the yard to the other?
A. Yes, sir.

Witness excused.

80 *Testimony of F. T. Woolum.*

F. T. WOOLUM, called as a witness on the part of plaintiff, after having been first duly sworn, was examined in chief by Mr. Chiew, and testified as follows:

Q. Mr. Woolum, is Frank T. Woolum your name?
A. Yes, sir.

Q. You live at Van Buren, Mr. Woolum?
A. Yes, sir.
Q. How long have you lived here?
A. Twenty two years, the sixth day of February.
Q. What business have you followed most of your life, Mr. Woolum for a livelihood?
A. Railroading up to six years ago.
Q. What railroad did you work for?
A. Iron Mountain.
Q. Ever work for the Frisco?
A. Yes, sir.
Q. How long ago since you worked for the Frisco?
A. I left there in 1887.
Q. In what capacity did you work as a railroad man?
A. Well, on the Iron Mountain I broke about five months and the balance of the time I was conductor.
Q. In what capacity did you work on the Frisco?
A. I was promoted on the Frisco; I broke there four years.
Q. Did you ever work as a switchman in the yard?
A. Never in my life, no, sir.
Q. Are you familiar with the automatic or impact coupler?
A. I think so, yes, sir.
Q. I will ask you to state whether or not these couplers that I have asked you about are constructed so that when they come
81 together, the impact will couple them?
A. Yes, sir.

Over objection of defendant, the following testimony was admitted:

Q. State whether or not those couplers are so constructed that when they come together they will couple by the impact?
A. They do providing the draw-heads are properly adjusted.
Q. Ordinarily, from your experience and observation as a railroad man, what effect would an engine approaching a car with a coupler like the one I have asked you about, the engine, I mean, and a car equipped with that kind of coupler and they would come together five or six miles an hour, what effect would they have if they came together.
A. They would couple together.
Q. What effect, if any, would it have—say the switchman was standing near the draw-head on the engine on the foot-board what effect would that have on him if they were coming together five or six miles an hour?
A. I don't think it would have any.
Q. Ordinarily, between the front end of the switch engine and a car that is equipped as I have asked you about, how much space would there be between the foot-board that I have asked you about and the end of the car they were trying to couple?
A. May I modify that a little bit by showing the timber that runs under there in front?
Q. Yes.

A. Well, I presume it is three feet between that timber and the car, maybe a little further.

(To the asking and answering of each and every one of said questions the defendant at the time objected and excepted.)

82 Q. You speak of the timber, are you speaking of the dead-wood or the man-head?

A. Yes, sir, that piece of timber that the foot-board is fastened to.

Q. Is that a piece of timber 8 x 8 that protrudes out from the end of the car?

A. I imagine it would be heavier than that.

Q. It extends out flush with the coupler?

A. No, the coupler extends out beyond that.

Q. The timber is back of that? How much would that extend from the end of the car?

A. I presume three feet or further possibly.

Q. You don't understand me, Mr. Woolum, I don't think. Put you feet down here under there (indicating) say that your feet was a coupler and this was the end of the car (indicating) where would those man timbers be?

A. The draw-head is fastened onto this dead-wood (indicating).

Q. It is a piece of timber that extends out like my fist here? (Indicating.)

A. There is a couple of irons that goes down that the foot-board is fastened to.

Q. You are talking about the engine. I am talking about the car. Is there a piece of timber out there you call a mann-head?

A. No, it is what we call a dead-wood; right back of the draw-head, I presume it is probably two feet.

Q. You say the space there would be three feet?

A. Yes, sir.

Q. Based on your experience and observation as a brakeman, switchman and conductor?

A. Yes, sir.

83 (Over objection of defendant, the following questions were asked:)

Q. Suppose, Mr. Woolum, that a car was on the track, a coal car loaded with coal was on the track and an engine was equipped with the automatic coupler I have asked you about and it was in good condition and this car on the track had no draw-bar or automatic coupler in it, what effect would that have on the switchman——

Mr. DAVIDSON: That is objected to your honor.

Mr. CHEW: I don't care about insisting on that.

Q. If the car had no draw head in it and the engine did have a draw-head on it and the engine should come against the car five or six or seven miles an hour, what effect would it have on the switchmen on the foot-board?

A. It would have a mighty bad effect on the switchman if he was in there.

Q. Suppose that the car was equipped with a coupler in good

condition and the knuckle was closed and the engine was equipped with a coupler in good condition and they came together and not couple, what effect would it have on the car?

A. Knock the car away from the engine.

Q. Move it away?

A. Yes, sir.

Q. Mr. Woolum, did you know Mr. Conarty in his life time?

A. Yes, sir.

Q. How long did you know him?

A. I couldn't hardly state that; for two or three years probably; all the time he was there.

Q. How many years?

A. Why, I suppose he was here possibly two or three years.

Q. I will ask you to state whether or not you observed him enough to tell us whether he was an energetic or lazy indolent man?

84 A. I would consider him an energetic man.

Q. How did he appear to you as to health?

A. Good health.

Q. How long before his death did you last see him?

A. He left here—I don't know how long, possibly a year; I hadn't seen him a year possibly before his heath.

Q. The last time you saw him he was apparently in good health and an energetic man you say?

A. Yes, sir.

Cross-examination by Mr. DAVIDSON:

Q. Mr. Woolum, you have not worked for the Frisco since 1887?

A. No, sir.

Q. You never did work in the yards, never was a switchman?

A. No, sir.

Redirect examination by Mr. CHEW:

Q. I will ask you if your business as a brakeman and conductor took you in the yards so that you did observe and know——

A. I ran a local here for about twelve years; that was all in the same line.

Witness excused.

85 *Testimony of George Lindsey.*

It is agreed between counsel that the testimony of George Lindsey (colored) given at a former trial of this cause, may be read to the jury and considered as his testimony in this trial, said witness having died since the former trial.

Former sworn testimony as follows:

Direct examination by Mr. CHEW:

Q. Is George Lindsey your name?

A. Yes, sir.

Q. How old are you, George?

A. I don't know sir, just exactly; about sixty-seven years old, maybe not quite so old. Believe I was born in '44.

Q. That is your information?

A. Yes, sir.

Q. Do you live in Fort Smith?

A. Yes, sir.

Q. How long have you lived here?

A. Ever since '63.

Q. You were living here then last November, November 1910?

A. Yes, sir.

Q. What business were you engaged in at that time?

A. Working in the Oil Mill, looking after sacks and stuff like that.

Q. Arkansas Cotton Oil Mill?

A. Yes, sir.

Q. Where is that mill situated as to the Frisco railroad tracks?

A. On the west side of the Frisco tracks six or seven blocks from the avenue.

Q. Where were you on the night of the 12th of November
86 and the early morning of the 13th of November, 1910?

A. I was night watching on the outside of the Oil Mill; that was on Saturday, I believe it was.

Q. For who?

A. For the Oil Company.

Q. Now, did you see a young man down there that was injured by some railroad cars?

A. I would not say that I seen him then, I might have seen him, I don't know. I seen the switch engine pass several times.

Q. Did you see a switch engine going toward the river or north about that time?

A. Yes, sir.

Q. Where was that engine?

A. It was up about the Border City Ice Factory when I noticed it going——

Q. When you saw that engine going north, was there anything on the main line track?

A. There was a box car and I think a flat coal car; I think the box car was on the north end of that flat car.

Q. There was a box car attached to the coal car then was there?

A. There was one there; I don't know whether they were attached or not, they were right close together.

Q. Which car would be closer to the engine, the coal car or box car?

A. The coal car, it was on the south end of the box car.

Q. Now, did you hear anything after this engine went down in that direction, make a noise in any way or did you see the collision?

A. No, sir, I was too far off to see it, I heard a noise and I didn't think at the time—I thought they didn't strike the draw-bar.

87 Q. How far away were you and what direction from these cars at the time the engine struck them?

A. I was north of them just below the Oil Mill crossing.

Q. About how far were you from the cars?
A. About a block, I think.
Q. Did you notice this coal car after the collision, did you go up there?
A. Yes, sir, I was there the second time.
Q. Were these cars moved from the place after the collision?
A. Yes, sir.
Q. Who took them away? How were they taken away?
A. Another switch engine come up there and got them.
Q. How long had these cars been standing on the track, of your own knowledge before this engine struck them?
A. I don't know.
Q. About how long?
A. They were up there when this engine, when I seen this engine going up that way.
Q. How long after you heard this noise until the engine come and got that coal car and took it away?
A. Twenty-five or thirty minutes, if not longer.
Q. Where had you been just before you saw this engine and heard this noise?
A. I had been down at the north end of the Oil House; I was going up the Frisco track and was going up around the Oil House.
Q. Now, before you saw this engine coming and then heard this noise, had you seen an engine with some cars attached to it going toward the river, or not?
A. I don't know. I believe there was. I believe there was
88 a switch engine down below me at some crossing but I won't say. I didn't pay much attention to them. There was three engines north of me, two of them was freights I am satisfied. One of them was facing to go south and one had just come in from the north.
Q. What were the three engines doing?
A. I think they were switching.
Q. How long after you—after that was it until you saw the engine coming and heard it strike this car?
A. I guess it was about four or five minutes. I poked along up the track there. I guess may be it was about ten minutes.
Q. When you went up there—you say you went up there the second time—did you see any engine east or north of you at that time?
A. *They* was an engine down there but I don't know whether it was a switch engine or not.
Q. How far from you?
A. About two blocks, I guess, about the lower end of the Oil Mill.
Q. Had you seen this coal car any time in the yard before that time?
A. Not as I know of; didn't never notice the number. If I had noticed the number, I could have said.
Q. Please state whether or not at the time that engine struck the cars if you were looking at them?
A. I might have been looking up that way, but I could not see them, it was dark, I don't know—I was walking going that way

south, but I could not exactly say that I seen it but then I know that those cars moved, they were on the main line and they moved after they struck it.

Q. How far did they move?

89 A. I don't know. About the length of that coal car, I think.

Q. After they struck, they moved about the length of the coal car?

A. Yes, sir.

Cross-examination by Mr. DAVIDSON:

Q. What did you spend the night down there for?

A. The Oil Mill Company has got me hired there.

Q. You watch around the outside to see if there is any fire?

A. Yes, sir.

Q. How long is that building?

A. It is, I guess about three blocks long.

Q. Do you walk all around it?

A. Yes, sir.

Q. How often?

A. Once every hour.

Q. Had you been around it that night at the time you saw these cars standing there?

A. Yes, sir, I had been around it.

Q. How long since?

A. I had went up the Frisco track, two lots above the end of the rock building—the company have got a house in on two lots this side of the building—and went around and taken the Iron Mountain——

Q. Just answer my question and stop right there. When you went around you came out of the office did you?

A. Yes, sir.

Q. That is on the south end of the building isn't it?

A. The north end.

Q. And you walked south to the end of the building?

A. Yes, sir.

90 Q. Then you walked west to the Iron Mountain tracks?

A. Yes, sir.

Q. And then walked north to the north end of the building?

A. Yes, sir.

Q. Then east to the Frisco tracks?

A. Yes, sir.

Q. Then down the Frisco tracks?

A. Yes, sir.

Q. Was it as you started out that you saw the cars there?

A. No, sir.

Q. After you heard it or before you heard the collision?

A. After I had walked all this round and had got back by the side of the Hull House.

Q. Where is the Hull House?

A. North end of the Oil Mill.

Q. You saw them standing there then?
A. I seen the box car.
Q. How many tracks was there at that point?
A. I don't know sir, five or six or seven.
Q. How many west of the main track?
A. Right at that point?
Q. Yes?
A. One.
Q. How many east?
A. I think six.
Q. You saw a box car standing there. Was it attached to the coal car?
A. I don't know sir.
Q. Was it up against it?
A. I don't know that.
91 Q. Was it as much as five or ten feet from it?
A. I couldn't say.
Q. Do you think it was on the same track?
A. I know it was on the same track.
Q. How close were you to it at the time you saw it?
A. I was down, I reckon two, maybe three lots, about 150 feet.
Q. It was in the night time?
A. Yes, sir.
Q. Was there any street light burning there?
A. No, sir; there was two head lights on the engines up there burning.
Q. Were they coming toward you?
A. Both of them were headed south.
Q. And it was by them that you say the coal car?
A. I didn't see the coal car; I saw the box car.
Q. When did you see the coal car first?
A. When I went up there after I heard this noise.
Q. That is the first you saw of the coal car?
A. Yes, sir.
Q. You didn't see the switch engine come down there with thirteen or fourteen cars just before that did you?
A. No, sir.
Q. Didn't see any switch engine at all coming from the east, from the north down south?
A. No, sir, I didn't see none down there but this switch engine.
Q. Now, the switch engine that you did see, which was did it come from?
A. From the north.
Q. Did it have any cars?
A. I think this engine had three or four when I seen it. I
92 was there at the end of the building on the property of the Ice Factory; I think they passed me right along there.
Q. Did you stop on your way around?
A. Yes, sir, maybe a dozen times.
Q. And you went around that building?
A. Yes, sir.
Q. Did you see a switch engine south of this coal car?

A. Yes, sir.
Q. How close was it to the coal car?
A. When I went up there they was about eight or ten feet apart.
Q. That is the time Mr. Conarty was hurt?
A. Yes, sir, he was lying there on the ground.

Witness excused.

93 *Testimony of Mrs. Fanny M. Conarty.*

Mrs. FANNIE M. CONARTY (Plaintiff), called as a witness in her behalf, after having been first duly sworn, was examined in chief by Mr. Chew, and testified as follows:

Q. Mrs. Conarty, is Fannie Conarty your name?
A. Yes, sir.
Q. How old a woman are you madam?
A. Thirty-six years of age.
Q What is your general health, Mrs. Conarty, good or bad?
A. Good.
Q. Your health is good?
A. Yes, sir.
Q. I will ask you if you are the widow of Greer Conarty?
A. I am.
Q. You are the administratrix and the plaintiff in this action?
A. I am.
Q. How old was Mr. Conarty?
A. He was thirty-six years old.
Q. What was the condition of his health mentally and physically at the time he was injured, Mrs. Conarty?
A. Good.
Q. State to the jury whether or not you have any children by Mr. Conarty, if so, tell the jury how many and who they are?
A. I have three.
Q. Give their names please.
A. Elmore Conarty, ten years of age, Jack Conarty, seven and Virginia Conarty four.
Q. Virginia, now is a daughter?
A. Yes, sir.
Q. Is this one of the boys here?
A. Yes, sir.
94 Q. Is that Elmore?
A. Yes, sir.
Q. He is the youngest son?
A. Oldest son.
Q. He is how old, did you say, ten?
A. Ten.
Q. Is that the little girl coming in here?
A. Yes, sir.
Q. You say she is four years old?
A. She is four.
Q. What was the habits and character of your husband, Mrs.

Conarty, as to being an energetic, strong and vigorous man or a weak man?

A. Why, he was a strong, energetic man.

Q. I will ask you to state what his custom and habits were as to work?

A. He was very industrious.

Q. I will ask you to state whether or not he worked all times he could get work?

A. Indeed he did.

Q. How long, of your own personal knowledge, had he been engaged in railroad business?

A. Well, I suppose about fifteen years.

Q. How long were you married to him, madam, at the time of his death?

A. We married the 27th of December, 1900.

Q. And you had been married then practically ten years liking about a month being ten years?

A. Yes, sir, liked one month being ten years when he died.

Q. Did he ever work her- in the Iron Mountain yards?

95 A. Seven years.

Q. Where did you come from to Fort Smith, if you were living at Fort Smith at the time of his death?

A. From Van Buren in September before his death in November.

(Over objection of defendant because the plaintiff was the wife and administratrix of the estate of deceased and was incompetent to testify, the following testimony was admitted, to which defendant excepted):

Q. Now, how much money did your husband give you for the support and maintenance of your family, Mrs. Conarty, about how much money per month or per year during his life did he contribute to you or give you for your support and maintenance and that of your children?

A. Well, you see Mr. Conarty's check varied; some months he drew a good check and others he didn't but I cashed more of his checks than he did.

Q. What were his checks?

A. The last check he gave me was for two weeks wages, somewhere between $73 and $74, from the 1st to the 13th.

Q. Of what month?

A. The last check he made was in November somewhere between $70, $72 or $73, I don't remember, something over $70.

Q. Somewhere between $70 and $80?

A. As well as I remember it was something more than $70.

(To the admission of each and every one of said questions and answers, defendant at the time excepted).

And over objections for same reasons the following was admitted:

Q. Now, how often did he contribute money to you and to your children, Mrs. Conarty, every two weeks or every thirty days?

96 A. Every two weeks.

To the admission of which defendant excepted.

Q. Had you any other means of support and have you any means now of support for yourself and children?

A. I did not and I have not now.

Q. Where were you and what time of day or night was it when you first learned of the injury to your husband, Mrs. Conarty?

A. It was about five o'clock in the morning, on the morning of the 13th.

Q. 13th of November, 1910?

A. Yes, sir.

Q. Where were you?

A. I was at home in Fort Smith.

Q. I want you to state please, as near as you can, the conduct of your husband towards his children, whether or not he was fond of them and tried to educate them or whether he was negligent about them?

A. He was interested in them; as much as any father could be interested in his children.

Q. Did he pay any special attention to any one of them about developing him?

A. Well, the second child is not very strong and he gave him special attention.

Q. When you heard of your husband's injury, did you go to him, and where did you find him?

A. As soon as I could, I went to him at St. Edward's Infirmary.

Q. In the city of Fort Smith?

A. Yes sir. I reached him about seven o'clock.

97 Q. In the morning?

A. In the morning.

Q. Now, what condition did you find him in at that time as to being conscious or unconscious?

A. When I first reached him he was not conscious. The doctor came about eight; Dr. Holt reached him about eight o'clock and he removed him from the ward down to the second floor in a private room.

Q. What was your husband's condition as to injuries at that time, Mrs. Conarty, did you notice any injuries on his body?

A. His head was all bandages and his face was swollen twice its natural size. His eyes were closed; his jaw bones were broken here and here (indicating). He had a hole in this lip (indicating), this side was cut, his skull was fractured; this limb was broken and there was a spike had gone through the fleshy part of this limb; it protruded almost under—when Dr. Holt dressed this, I couldn't see this limb because he couldn't move it and the bandages stayed secured just as the doctor placed it but this one gave him so much pain and I presume wasn't broken as the other limb; he constantly moved that one and complained of it and the bandage would not stay and for that reason I could see the one in this limb and it was, I suppose, a hole three or four inches, and he was bruised, Oh: he was bruised all over. Why he wasn't killed instantly, I don't know.

Q. You say when you got to him the first time he was unconscious?

A. He was; he didn't know me for, I suppose about six o'clock that evening I went to him and took his hand. He couldn't see me and I asked him if he knew me. He pressed my hand. He says,

"Oh; yes, it is May, my wife," and I told him Mr. Lake, his
98 brother-in-law had come from Fort Gibson and he said "Didn't Ma come," that was his mother.

Q. How long did you remain with him after you got to him and after consciousness returned; how long did you remain with him, Mrs. Conarty?

A. I stayed with him from Sunday until Wednesday; only just one hour on Monday and Tuesday I went to our home for dinner.

Q. Did he appear at the time to you to be suffering any physical or mental pain?

A. Oh: yes, sir, intensely.

Q. When you left him on Wednesday, did you tell him where you were going?

A. I did.

Q. Did he seem to understand?

A. Oh: yes, he had recovered his sight on about Tuesday I think, and he could see Wednesday some and I told him that his sister was coming from Texas. She was then at our home down on Eighth street, and that she was coming to stay with him while I went home to rest and I says: "You don't mind it, do you?" He says: "No, May, I wish I could go with you, May."

Q. He seemed to appreciate and understand where you were going at the time?

A. Certainly, certainly, he did.

Q. How long did he lay there in bed in the hospital until death took place?

A. He died at one o'clock on Saturday afternoon, from the effect and the result of these injuries.

Q. The 19th of November?

A. The 19th of November, yes, sir.

99 Q. Died there in Fort Smith?

A. Yes, sir. Thursday night was an awful night with him.

Q. Thursday night was?

A. Yes, sir.

Q. What do you mean by an "awful" night?

A. Well, I will tell you. I went back to him on Thursday evening. I left him Wednesday and went to our home and his sister stayed with him and when I reached him again, I told him, asked him hoe he felt. He says: "I believe I feel some better" and I says: "the children want to come so bad to see you, they came part of the way with me"——

(Objected to by defendant's counsel.)

The WITNESS: He says: "Why didn't you bring my children, don't you know I want to see them?"

Q. Spoke to you about the children and seemed to understand and know what he was doing?

A. Yes, sir.

Q. Was he suffering much then?

A. Oh: yes, he suffered all the time. But Thursday night when I went back to him I asked him how he felt. He says: "I am a mighty sick man and unless I get better soon, I won't be here much longer."

Q. He said unless he got better, he would not be here long?

A. Yes, sir, and Wednesday while I was gone, he says——

Q. Never mind unless you were present.

—. ——.

Q. Now, I believe you stated that he died on Saturday about one o'clock. Was that one o'clock in the morning or afternoon?

A. Afternoon.

(Over objection of defendant for the reason that the witness was the wife and administratrix of deceased, and the testimony
100 inadmissible and incompetent and she being incompetent to testify as to transactions of deceased, the following testimony was admitted):

Q. On an average per month during the last year of his life about how much would he contribute toward your support; just take an average, not any one month but on an average, would it be as much as $140 per month or $100 per month or what was it?

A. Well, I suppose about $125 or $130 a month.

Q. That extended through the la-t year of his life?

A. Yes, sir.

(To the admission of which, defendant at the time excepted.)

Cross-examination by Mr. DAVIDSON:

Q. Mrs. Conarty, you say you lived here what year?

A. I lived here until September, 1910.

Q. And then moved to Fort Smith?

A. We did.

Q. Been living there ever since?

A. No, sir, I lived there until April 1911, then I came back to Van Buren.

Q. You live here now?

A. No, sir, I stayed here then until October 5, 1911 and then I went back to Fort Smith.

Q. And have lived there since?

A. Yes, sir.

Q. How old was your husband at the time of his death?

A. Thirty-six.

Q. Had he accumulated any property?

A. No, sir.

101 Q. Left you no property at all?

A. No, sir.

Witness excused.

102 *Testimony of I. B. Cliff.*

I. B. CLIFF, called as a witness on part of plaintiff, after having been first duly sworn, was examined in chief by Mr. Chew, and testified as follows:

Q. Mr. Cliff, I believe we have agreed that your name is I. B. Cliff, is that correct?
A. Yes, sir.
Q. How old a man are you, Mr. Cliff?
A. Thirty-four.
Q. You reside at Fort Smith?
A. Yes, sir.
Q. What is your present occupation and business?
A. Grocery business—meat market.
Q. In the city of Fort Smith?
A. Yes, sir.
Q. I will ask you to state whether or not, Mr. Cliff, you were ever employed by the St. Louis and San Francisco Railroad Company in the city of Fort Smith in the yards?
A. Yes, sir.
Q. How long were you employed there?
A. Something near two years.
Q. Were you employed there in November, 1910?
A. Yes, sir.
Q. Were you acquainted with the deceased in this case, Mr. Greer or W. G. Conarty?
A. Yes, sir.
Q. How long had you known him?
A. Well, I had known him for possibly a year, maybe more, I don't know just exactly.

Q. I will ask you to state whether or not he was employed
103 there in the yard, and in what capacity?

A. He was switchman.
Q. For the Frisco railroad?
A. Yes, sir.
Q. Had he been employed all the time you had known him?
A. Yes, sir.
Q. What was your business there, Mr. Cliff?
A. I was light repair man in the yards.
Q. You mean by that, that you made light repairs on cars that became defective?
A. Yes, sir.
Q. That was your position?
A. Yes, sir.
Q. I will ask you if you noticed a coal car branded N. O. & N. E., that is the initials of the car, loaded with a car load of coal in the yards the night Mr. Conarty was injured?
A. I don't know whether I did or not.
Q. Did you see it before that?
A. Possibly I did. I never made any inspection of it whatever.

Q. Where was it when you saw it before he was killed, your best recollection?

A. If I seen it at all it was in the yards there.

Q. On what track?

A. I couldn't say.

Q. Do you know where track No. 2 is over there?

A. Yes, sir.

Q. Do you know whether this car was on that track or not, Mr. Cliff?

A. I couldn't say positively whether it was or not.

104 Q. Whose business was it to see about these bad order cars on it?

A. Car Inspector.

Q. Who was the car inspector at that time?

A. We had four of them.

Q. Was there a man by the name of John Love there at that time?

A. Yes, sir.

Q. Do you know where Mr. Love is now?

A. No, sir, I do not.

Q. Were you present at the time Mr. Conarty was injured?

A. No, sir.

Q. Did you see him that night?

A. No, sir.

Q. Did not?

A. No, sir.

Q. What was the habits and custom of Mr. Conarty as to being an energetic, working man or a lazy man?

A. I couldn't say. I always seen him working the same as the rest of the men, that is all I can say.

Q. Do you know of your own knowledge, his post of duty on the engine, where he was required to ride?

A. Well, I think at that time he was——

Mr. DAVIDSON: I would suggest that he is not in that line of work——

The WITNESS: I don't know where he was that night.

Q. Where was his post of duty?

A. Sometimes on one side and sometimes on the other.

Q. Is there such a thing as a foot-board on that engine?

A. Yes, sir.

105 (Objected to by defendant's counsel.)

Mr. CHEW: I will not insist on that.

Witness excused.

106 *Testimony of Jno. Lake.*

JOHN LAKE called as a witness on part of plaintiff, after having been first duly sworn, was examined in chief by Mr. Chew, and testified as follows:

Q. Is John Lake your name?
A. Yes, sir.
Q. How old a man are you, Mr. Lake?
A. Forty past.
Q. I will ask you to state whether or not you were raised here in Crawford County?
A. I was raised up until I was twenty-five years of age in this county.
Q. Down at Alma?
A. Near Alma.
Q. Where is your place of residence now?
A. In Oklahoma.
Q. Fort Gibson?
A. Yes, sir, Fort Gibson, Muskogee County.
Q. What relation, if any, were you to W. G. or Greer Conarty as he was commonly called?
A. I was a brother-in-law to him.
Q. Did you marry his sister?
A. Yes, sir.
Q. Is she here?
A. Yes, sir.
Q. How long did you know Greer Conarty, Mr. Lake?
A. Right about thirty years.
Q. You and him were practically the same age?
A. Yes, practically the same. I think he is a few months older than me; my remembrance, I am not sure.
107 Q. How long had it been before his death since you had seen him last, Mr. Lake?
A. The last time I saw him before his death was in August.
Q. August 1910?
A. Yes, sir.
Q. What was the character and habits of the man, Mr. Lake, as to industry and energy?
A. He was a hard working man.
Q. Industrious man, hard working industrious man?
A. What you call a hard working, industrious man.
Q. What was his appearance to you as to health?
A. His apparent health was good.
Q. Were you present or did you see him after he was injured, over here in St. Edwards' hospital?
A. Yes, sir.
Q. When did you first get to him?
A. About 10:30 Sunday night after the accident occurred in the morning.
Q. You got to him at 10:30 at night, Sunday night, and the injury occurred either Saturday night—somewhere between midnight Saturday night and Sunday morning?
A. Yes.
Q. Did your wife come with you?
A. Not at that time.
Q. Did she finally come down?

A. She did later.

Q. State whether or not Mr. Conarty, when you got to him, was conscious?

A. Yes, he was conscious all right, at that time. When I first got to him he seemed to be sorter drowsy but he recognized me.

108 Q. Did recognize you?

A. Yes, sir.

Q. How long did you stay with him, Mr. Lake?

A. Well, at that time I stayed through that night, that is I stayed in Fort Smith; I didn't stay at the hospital; I stayed there until about twelve o'clock or a little after and come down to the city and stayed over night and come back and stayed the next day until about two o'clock in the afternoon.

Q. Was he conscious the next morning?

A. Yes, he seemed improved the next morning.

Q. Did he appear to be suffering or not, at that time?

A. At that time he seemed to suffer a great deal; at other times he seemed to pass, at times into semi-unconsciousness, but at other times he seemed to rouse up.

Q. Did he make any complaint to you about his suffering?

A. No, not in spoken words. He would tear his bandages.

Q. Make any complaint about the bandages giving him pain?

A. Not, as I say, in spoken words; he would tear them loose.

Q. From what part of his body?

A. Well, sometimes from his head and maybe one of his limbs.

Q. Which one of his limbs?

A. My remembrance is the left one.

Q. Did you make any effort to keep him from doing that?

A. Oh: yes, time after time, I would catch his hands and hold him and straighten his limbs in the bed.

Q. You went away about Monday?

A. Yes, sir, I left there, I think it was something about two o'clock; I didn't leave the city until late in the evening; my train was late.

Q. Were you back there at any other time?

109 A. Yes, the latter part of the week I think I got here.

Q. State whether or not he recognized you at that time?

A. Well, I didn't put myself before him in a way for him to recognize me excepting one time, I thought he fully recognized me at that time.

Q. How did he appear then, at that time as to suffering?

A. He seemed to be suffering very intensely.

Q. Were you present at the time dissolution took place, the time he died?

A. Yes, sir.

Q. Did you know anything about or did you ever see his wife in possession of any checks made payable to him? Do you know anything about his income?

A. No, not directly, I didn't know anything about his income. I did see her in possession of one check. I cashed it for her.

Q. When was that, Mr. Lake?

A. It was on Saturday morning, I think, before his death that I cashed it.

Q. The same day that he died?

A. Yes, my remembrance is that it was either Saturday morning or Friday evening before, I am not certain.

Q. Where did you get that check?

A. It was a railroad check.

Q. St. Louis and San Francisco Railroad Company check?

A. St. Louis and San Francisco Railroad Check.

Q. And you say you cashed that?

A. Yes, sir.

Q. How much was it?

A. I cannot say exactly; it was around $80. I don't remember the exact amount.

110 Cross-examination by Mr. DAVIDSON:

Q. Mr. Lake, how long did you say you knew him?

A. Right about thirty years.

Q. Was he working all that time?

A. Oh: not, not all the time. I went through school with him.

Q. How many years did you know him when he worked?

A. That would be impossible to say.

Q. Well, approximately?

A. Well, he worked part of the year, you know—he had times—he was on a farm for quite a while during the school time. He worked part of the year on the farm and would go to school part of the year.

Q. He was twenty years past his majority, was he not?

A. You mean at his death?

Q. Yes.

A. Something in that neighborhood.

Q. During that period of time, what part of the time did he work?

A. Well, I would say ninety per cent of it.

Q. Did he ever accumulate any property?

A. Not to any extent.

Redirect examination by Mr. CHEW:

Q. Were you about his home any during his life?

A. Oh: yes, I was at his father's home when he was there.

Q. I mean while he was living with his wife and children?

A. Yes, I was there several different times.

111 Q. What was his conduct or appearance toward his children as to being interested in their development?

A. Why, he seemed to take quite a little interest in his family; he was always kind to them and they seemed to thing a great deal of him.

Witness excused.

112 *Testimony of Mrs. Jno. Lake.*

Mrs. JOHN LAKE called as a witness on part of plaintiff, after having been first duly sworn, was examined in chief by Mr. Chew, and testified as follows:

Q. Mrs. Lake, are you the wife of the gentleman, Mr. John Lake that was just on the stand?
A. I am.
Q. About how old a woman are you, Mrs. Lake, please?
A. I am thirty-eight years old.
Q. I will ask you if you knew a man by the name of Greer or W. G. Conarty during his life time?
A. I did.
Q. What relation were you, if any, to him?
A. Sister to him.
Q. He was older than yourself?
A. Yes, about three years.
Q. Where was your brother raised? Down about Alma in this county?
A. Yes.
Q. Were you frequently about his home, Mrs. Lake, during the time they stayed together, that he and his wife lived together?
A. For a visit, yes, occasionally.
Q. How long before his death was it that you saw him last?
A. It must have been a year, Mr. Chew.
Q. What was the appearance of your brother at that time as to health?
A. Good health.
Q. When did you first learn of his injury?
A. A message came to my home in Fort Gibson on Sunday morning about eight o'clock.
113 Q. Did you come to Fort Smith in response to that telegram?
A. No, my mother was ill at that time and I couldn't leave her so I didn't come until the following Thursday.
Q. When you were about your brother's home there, what was his conduct and action toward his children as to being kind and considerate of them?
A. I didn't find anything to complain of; he was a thoughtful father; kind husband.
Q. Now, when you got to him on Thursday, did you find him in the St. Edward's hospital?
A. I did.
Q. State whether or not he recognized you when you got there?
A. I was taken to the ward and his wife asked him if he knew me. He didn't speak but he nodded his head.
Q. Did you take hold of him?
A. I was at his bed-side, I don't remember touching him because he was bruised so; of course it affected me so, his sufferings.

Q. Did he appear to be conscious of his suffering at that time?
A. Why, I took it so.
Q. He so appeared to you?
A. Yes.
Q. Now, I will ask you to state whether or not you were present at the time any money was paid him or offered to be paid him?
A. I was not.
Q. Were you there when anyone—state whether or not you were there when anyone was there with a pay roll and wanting to pay him some money, or trying to get him to sign the pay roll?
114 A. No, that was before I came.
Q. You didn't see that?
A. No.

No questions on cross examination.
Witness excused.

115 *Testimony of J. H. McKinney.*

J. H. McKinney called as a witness on part of plaintiff, after having been first duly sworn, was examined in chief by Mr. Chew, and testified as follows:

Q. Mr. McKinney, is Hill McKinney your name?
A. Yes, sir.
Q. How old a man are you Mr. McKinney?
A. Thirty-eight in September.
Q. What business are you engaged in now?
A. I am a clerk in the office of the general foreman of the Iron Mountain railroad.
Q. Where were you raised, Mr. McKinney?
A. I was born a mile and a quarter below Alma and lived there until I was fifteen years old and then moved here.
Q. Van Buren?
A. Yes, sir.
Q. You are a Crawford County product then, are you?
A. Yes, sir.
Q. Did you know a man by the name of W. G. or Greer, Conarty, during his life time?
A. Yes, sir.
Q. How long had you known him?
A. Well, I knew him from the time I was old enough to go to school; between twenty-five and thirty years.
Q. Were you about his home any during his life time, I mean after he married?
A. Yes, sir.
Q. You were about his place then?
A. Yes, sir.
Q. What was his conduct in his home as to being kind and
116 considerate of his family?
A. He always seemed kind. I never saw any ill treatment or anything like that toward any of his family; always seemed kind.

Q. Seem to be interested in his children?
A. Yes, sir.
Q. Did you see him after he was injured?
A. Yes, sir.
Q. When did you first see him?
A. He was injured on Saturday night and I first saw him Monday about noon; about eleven o'clock as well as I remember.
Q. I will ask you to state whether or not he appeared to be suffering to you at that time?
A. Yes, sir.
Q. Did he know you and was he conscious at the time?
A. Yes, sir, he knew me. I told him who I was. I visited him as soon as I learned of his injury. I caught a car and went out to the hospital and walked in the room where he was and I told him who I was. He lifted his hand and I shook hands with him and asked him how he was feeling and he tossed his head like he felt pretty bad or, or some such expression.
Q. Were you with him any more after this?
A. I saw him on Monday and Tuesday. I missed one day I believe it was Wednesday that I missed. I saw him every other day except the one day.
Q. Were you present at the time of his death?
A. No, sir, I had been there.
Q. I will ask you if he appeared to be suffering each time you saw him and conscious of the fact that he was suffering?
A. Yes, sir, he would twist his head and move his arms, I was told, I didn't see it, I believe he——
117 Q. Never mind what you were told.
The WITNESS: He would try to pull the bandages off his head.
Q. I will ask you to state whether or not you were present at the time any one for the St. Louis and San Francisco Railroad Company paid him any check or money of any kind?
A. Yes, sir.
Q. Did you see that check?
A. No, I didn't see the check and I cannot state positively that the check was delivered but the cashier or someone from the local office was out there with his check. I cannot say positively whether he delivered it at the time or not.
Q. You don't remember the check sufficiently to tell us——
A. I didn't see him deliver the check to any one.
Q. Can you tell us the amount of the check?
A. No, sir.
Q. Did you see it on the pay roll?
A. Yes, but——

Mr. DAVIDSON: Mr. Chew we have the pay roll here to show the amount.
Mr. CHEW: I have not got it, Major.
The COURT: What do you admit it to be? Do you know what the amount is?
Mr. DAVIDSON: I don't know what the amount is.

Mr. CHEW (continuing):

Q. I will ask you to state whether or not you saw him make any effort to sign his name to the pay roll?

A. I didn't see him make any effort to sign his name on the pay roll. I saw him make an effort to sign his name on a piece of paper; a card that I handed him.

Q. Did he attempt to write his name on this card?

118 A. Yes, sir.

Q. I will ask you if this is the card you handed him at that time and if that is what he wrote on the card? (handing card to witness).

A. Yes, sir.

Q. What do you find on that card?

A. "W. G. C.—He attempted to make an "o" and then marked off there. He dropped the card; let his hands fall.

Q. Did he appear at that time to be suffering any?

A. Yes, sir.

Q. What day was this, Mr. McKinney?

A. My recollection is that was Thursday.

Q. Thursday before his death on Saturday?

A. Yes, sir.

Q. Did you attend his funeral?

A. Yes, sir.

Q. At Alma?

A. Yes, sir, Sunday afternoon.

No questions on cross examination.

Witness excused.

119 *Testimony of Mrs. Fanny M. Conarty, Recalled.*

Mrs. FANNIE M. CONARTY recalled.

Direct examination by Mr. CHEW:

(Over objection of defendant for the reason that she was administratrix and sued as such and was the wife of the deceased and was incompetent to testify as to transactions with him, the following testimony was admitted):

Q. State whether or not you handled your husband's checks for the month of October, the month before the injury in November, whether you had the check or not?

(Objected to by defendants counsel.)

A. I did.

Q. What was the amount of that check from your best recollection?

A. Well, as well as I can remember it must have been something between $133, $134 or $135.

Q. Now, I will ask you to state if you used money for your own support and comfort and that of your children?

A. I did.

(To the admission of each of said questions and answers, defendant at the time excepted.)

Mr. CHEW: That is our case with the exception of the life table.
The COURT: Consider that in.
Plaintiff rests.

120 The defendant maintained the issues upon its part, introduced the following testimony, to-wit:

121 *Defendant's Testimony.*

Mr. DAVIDSON: I think we can abbreviate our case by putting in the record admissions that have been made. I will state them and if there are any objections let them be made now.

Agreement.

It is agreed by both parties that the car in question with which the engine collided, had been loaded with coal at Huntington and had been consigned to some point in Texas; that by some means the car was disabled requiring heavy repairs and for the purpose of making those heavy repairs it was brought from Jenson, which was on the line of road of consignment, from the point of origin to destination, to the city of Fort Smith a distance of fourteen miles off the route to the nearest point where the Frisco Railroad Company had repair shops, for the purpose of making repairs of this character, and that repairs of this character could not be made at Jenson where the car had become disabled——

Mr. CHEW: Major, I don't believe I will agree to that statement, that repairs of that character could not be made at Jenson.

The COURT: Mr. Haas stated that here on the stand.

Mr. CHEW: I think there is no doubt about that because they have no repair shops there.

Mr. DAVIDSON (continuing): That it arrived at Fort Smith on November 9, 1910, and was placed upon a storage track for storing disabled cars which storage track contained nothing but disabled cars; that the repair tracks three in number upon which repairs were made were at this time all occupied with damaged cars that were being repaired and that the track upon which this car was
122 place- was a track that was used for storage purposes only when it was necessary to store cars on anything except the repair tracks. It is also admitted that the coal car in question had been disabled and that there was no safety appliance on the west end of the car that would couple it to other cars when they came in contact; that there was no coupler at all upon that end of the car; that the draft timbers and head blocks were out of that end of the car and dead timbers and mann blocks; that the track upon which the damaged cars were stored, including the one in controversy, when not being used as a storage track for disabled cars, we used for commercial purposes; including all classes of cars.

It is conceded that the disable- car in transit from Jenson, Arkansas to Fort Smith, Arkansas, passed through a portion of the State of Oklahoma.

123 *Testimony of W. L. Corroto.*

W. L. CORROTO called as a witness on part of defendant, after having been first duly sworn, was examined in chief by Mr. DAVIDSON, and testified as follows:

Q. Mr. Corroto, where do you live?
A. Fort Smith, Arkansas.
Q. What are you engaged in?
A. Running an engine for the Frisco railroad.
Q. How much experience have you had in that line of work?
A. Well, I have had about twelve years altogether.
Q. Were you on the engine the night that Mr. Conarty was injured?
A. Yes, sir.
Q. Where had you been working?
A. Well, as well as I remember we had been doing some work on the House track and had shoved some cars in on what is known as the Team track and was going down the main line, north.
Q. For what purpose were you going north on the main line?
A. Switching there, I think, 735, freight train.
Q. Switching that? State to the jury what this consists of?
A. Well, it consists of switching cars in station order. Taking cars off the train and out of the train in station order.
Q. How many switching crews were there in the yards at that time?
A. Two.
Q. You had two crews by day and two by night, I believe?
A. Well, I don't remember whether there was two or three working days or not.
124 Q. There were two working at night any way?
A. Yes, sir.
Q. State whether, in switching, it is necessary to use the main line?
A. Yes, sir.
Q. Is it necessary to leave cars upon the main line?
A. Yes, sir.
Q. Can you switch without that?
A. You could in some places which we do in some places but we cannot very well switch a train in some places without that, where the yards are blocked and no room anywhere else.
Q. Now, state to the jury whether you knew that the other crew was switching the repair tracks in that part of the yard that night?
A. State to them where they were switching?
Q. Yes, sir.
A. Did I know they were switching? I didn't know what kind of cars they were handling.
Q. You knew the part of the yard they were working in?
A. Yes, sir.
Q. You knew they were at work in that part of the yard?

A. Yes, sir.

Q. Now, state to the jury the circumstances under which this accident occurred?

A. We were going down the main line and the switchmen were standing on the front foot-board and about 100 or 150 feet north of "E" street crossing I got a stop signal and I stopped the engine as quick as I could and the switchmen on both sides jumped
125 off the foot-board and we rolled up to a car just about like we were going to make an ordinary coupling. I applied the emergency brake and just barely hit the car and I suppose the car rolled about ten or twelve or fifteen feet, something like that; it was a small coal car.

Q. If you had failed to see the car, why was it?

A. 735 had pulled in on the scale track; the electric headlight was shining in our eyes, of course that bothered us of seeing anything until we got right up at it.

Q. You failed to see the coal car until you got the signal from the switchman?

A. Yes, sir.

Q. Were you up higher than the switchman down on the foot-board?

A. I was higher, looking ahead and looked right over the car; of course when I got right up to it I could see it.

Q. Those on the foot-board were a little closer to the car and they were also lower?

A. Yes, sir.

Q. Now, were you contemplating hitching onto this car at all?

A. No, sir.

Q. You had nothing to do with handling that car—your crew?

A. No, sir.

Cross-examination by Mr. CHEW:

Q. Mr. Corroto, do you know who the engineer was that was in the north part of the yard?

A. Vogel.

126 Q. Is he here?

A. Yes, sir, C. Vogel.

Q. If I understand your testimony correctly, when you and Mr. Conarty, Mr. Douglass and Mr. Daniels, your foreman, went over there on the city track, the lower yard or south yard, you didn't know what the crew below was going to do?

A. No, sir.

Q. You didn't know whether they were going to put any cars on the main line or where they were going to put them?

A. No, sir, I did not.

Q. Were the men, the switchmen who were with you, were they under the instructions of Mr. Armstrong, the General Yard master?

A. Supposed to be; he was the yard master.

Q. How come you to go over in that yard with this engine and these switchmen?

A. By the foreman's directions—Douglass. He tells the engine men where he wants to go; all we have to do is to work by signals.

Q. Where did he get his orders? From Armstrong?
A. I suppose he did.
Q. That is the rule is it?
A. Yes, sir.
Q. You say that the engine you were driving or controlling slipped right up to this car that caused the injury to Mr. Conarty?
A. I stopped the engine as quick as I could stop it after I got the signal; the engine barely moved up to it, it was a light car, small car.
Q. We don't question that.

The WITNESS: It moved ten or twelve or fifteen feet, I sup-
127 pose.

Q. Mr. Corroto, did you ever do any railroading other than firing or running an engine? Ever switch any?
A. No, sir.
Q. How long have you been working there in the yards?
A. About eight years altogether.
Q. From your experience in handling an engine and handling cars there in the yards, if this coal car had a draw-head in the end of it——

(Objected to by defendant's counsel.)

The COURT: This is not disputed and has been proven.
Mr. CHEW: I want to get it from this man. He has already testified that the engine had slipped up so he could make a coupling—I want to ask him from his experience as a railroad man—he said he had had about eight years' experience—if this coal car had had a coupler in good condition in the end of it, what effect it would have had on Mr. Conarty——
The COURT: Let it go in.

(Defendant objected *to* and excepted.)

Q. Answer that question?
A. Just about made a coupling.
Q. There would have been no injury to Mr. Conarty on the footboard, if the coupling had been made?
A. Well, I don't believe there would.

A JUROR: I understand this is an expert witness.
The COURT: This is the engineer on the engine.

A JUROR: The question arises in my mind, if these timbers were out, this draw-head was out, wouldn't that leave some end timbers on each side of this car here so that a man couldn't get out?

128 The WITNESS: That would not have anything to do with it at all, whether the timbers were in there or not or the draw-head being out.

Mr. CHEW: Were there some rods protruding from the end of that car, Mr. Corroto?
A. I didn't notice any.
Q. I think what the juror means to ask you in this question, and I will ask it for his benefit. If there is no draw-head there the car

would be perfectly flat and the front end of the engine would go right up against it and your draw-head on the engine would go under the end of the car?

A. I suppose the coupler would just about slip under the sill.

Q. And let the front end of your engine go right up against the car?

A. Yes, sir.

Redirect examination by Mr. DAVIDSON:

Q. Mr. Corroto, were you contemplating hitching onto that car at all?

A. No, sir.

Q. You were not attempting to handle that car or hitch onto it?

A. No, sir.

Q. In fact, the fact that you didn't hit it harder was because you discovered it that soon; if you hadn't discovered it quite as soon as you did you would have hit it harder?

A. Yes, sir.

Q. If you had discovered it sooner, you could have avoided hitting it?

A. Few feet further.

129 Q. State whether there is a rule that requires you to anticipate that cars would be on the main line at anytime in switching, excepting when passenger trains are due?

A. Yes, sir.

Q. Then you were required to lookout for cars on the main line and anticipate that the main line would have them on it?

A. Yes, sir. Where the yards are blocked that way of course we expect to find the cars wherever we are switching, on the main line, side track or anywhere.

Q. There was no passenger train due at that time?

A. No, sir.

Q. And under the instructions and rules of the company, you were required to anticipate that cars would be on the main line at that time?

A. Yes, sir.

Q. These men were on the foot-board for the purpose of watching, seeing there would be no obstructions, were they not?

A. They were supposed to watch out, yes, sir. Of course, running an engine like that, they are supposed to work by signals. A man can't tell where he is going on an engine that way. They are supposed to work under a signal and that is all they have to go by.

Q. The fact that you were blinded by that head light prevented your seeing the car much sooner; you could have seen it much sooner?

A. I believe I could.

130 Recross-examination by Mr. CHEW:

Q. I will ask you if you expected to find cars on the main track—you were not expected to find crippled cars or cars without any draw-head in them?

(Objected to by defendant's counsel.)

Q. You would not expect to find cars on the main track at any time that had no draw-head in them?

A. Yes, sir, we might find any kind of a car, might find a good car.

Witness excused.

131 *Testimony of S. A. Douglass.*

S. A. DOUGLASS called as a witness on the part of defendant, after having been first duly sworn, was examined in chief by Mr. Davidson, and testified as follows:

Q. Where do you live, Mr. Douglass?

A. Fort Smith.

Q. What are you engaged in?

A. Switching.

Q. How many years' experience have you had?

A. Been working for the Frisco a little over fourteen years.

Q. Were you in Fort Smith on the night that Mr. Conarty met his death?

A. Yes, sir.

Q. What position did you occupy?

A. Foreman of the switch engine.

Q. Where were you at the time of the accident?

A. Standing on the front foot-board of the switch engine.

Q. Where was Mr. Conarty?

A. Standing between me and the draw-bar.

Q. Were you close enough to touch each other?

A. Just standing right side by side.

Q. Now, at the time of the accident, what first called your attention to the car on the track?

A. Conarty says "lookout there is a car."

Q. Now, tell the jury what you did when he made that remark?

A. I gave a signal to stop and got off.

Q. Did you step off at once?

A. Stepped right off; gave the signal at the same time.

132 Q. What did he do?

A. Mr. Conarty?

Q. Yes?

A. Well, I couldn't say. I just gave a signal and stepped off and the engine passed me.

Q. When the engine stopped, what was your relative position with reference to the engine?

A. I was standing about the rear end of the tank of the engine when it hit the car.

Q. How far did the engine move from the time you were notified that there was a car on the track until you stepped off?

A. Just as he says "lookout, there is a car", I just gave a signal and stepped off.

Q. About how far then did the engine move?

A. It didn't move very far. I got right off.

Q. How far did it move after you got off?

A. Well, it could not have went much more over the length of the engine; it could not have went any further.
Q. About the length of the engine?
A. About.
Q. Was there more than one car there?
A. Only one car.
Q. What did it have in it?
A. Coal, I think.
Q. And the engine collided with this car?
A. With that car, yes, sir.
Q. You were not contemplating hitching onto that car, coupling onto that car at all, were you?
A. No, sir, didn't know it was there until we saw it.
133 Q. What was it that prevented your seeing the car sooner?
A. Why there was a train pulling in down on the scale track below there and the electric headlight was shining in our face.
Q. That headlight was shining in your face?
A. Shining right in our faces.
Q. It was that that prevented your seeing the car sooner?
A. Yes, it was that I suppose.

Cross-examination by Mr. CHEW:

Q. Who was the engine foreman of the crew working in the north yard, Mr. Douglass?
A. Hetherington.
Q. Did you know the character of work they were doing down in that yard when you and Mr. Conarty——
A. I didn't know what they were doing at all, didn't have any idea what they were doing.
Q. Now, you say you stepped off the foot-board of the engine that you and Mr. Conarty and Mr. Daniels were on and it was coming toward Van Buren down the river, this direction?
A. Yes, sir.
Q. Were you on the side next to the city of Fort Smith?
A. I was on what we call the east side, on this side of the track.
Q. That would be then, next to the city of Fort Smith?
A. Yes, sir.
Q. That is the side you got off of?
A. Yes, sir.
Q. How far from the track did you get away?
A. I suppose I went over to the next track; a distance I
134 suppose of about eight feet.
Q. Which side did Mr. Daniels get off on?
A. He got off on the west side, the side next to the river.
Q. Do you recall seeing Mr. Conarty making an effort to get off?
A. I never looked around, I thought he got right off right after me.
Q. Was the draw-bar between Mr. Conarty and Mr. Daniels?
A. Yes, sir.
Q. You thought he got off right after you?

A. I just supposed he would follow me right off.

Q. Do you re-call to mind seeing him make an effort to get off just as the engine and car came together?

A. I wasn't right there when they hit.

Q. Is it not true, when you got to his body it was lying up on the pilot beam and his head over next to the city of Fort Smith?

A. Lying on the cylinder, yes, sir.

Q. Over next to the town of Fort Smith on the same side you got off of?

A. Yes, sir.

Q. You had no idea that this car was going to be on the track when you started down there?

A. No, sir, I didn't know.

Q. And Mr. Conarty did not?

A. I suppose not.

Q. If the train crew was working in the north part of the yards and got a string of cars ten or twelve in number, together with this crippled car out of track No. 2, how far would it have been away from the point where this collision took place?

135 A. If they had left the car there?

Q. No, if they got it out of track No. 2.

A. If they got it out of track No. 2, and left it there, that is pulling it over the switch after getting the car out—well I don't know.

Q. A mile or a mile and a half.

A. It is over a quarter of a mile, that is I should judge it would be.

Q. In taking cars out of track No. 2, do you pull them out at the east end of the switch, north end of the switch or at the south end?

A. As a rule they pull them out at either end; whichever is the handiest.

Q. How far would switch track No. 2 be away from the point where the collision took place.

A. It would be, I should judge, about seventy-five car lengths, I should judge that far.

Q. Now, this engine that came in there on 735, was it in charge of a hostler or was the engineer in charge of it?

A. The engineer, I suppose. The engineer handles the engine until he gets it into the terminal and then the hostler takes it to the roundhouse.

Q. Did you see him moving his engine down in that direction?

A. No, sir.

Redirect examination by Mr. DAVIDSON:

Q. Mr. Douglass, in taking those cars off of track No. 2, suppose there is a car at the west end without any coupling in the west end of it, they would have to hitch onto this string and

136 pull it out on the east end to get that car out?

A. Yes, sir.

Q. Then they would have to go on the main track. Suppose they wanted to put that car onto a repair track, they would have to move it out and shove it down the length of the train and push it out on the main line?

A. Yes, sir, drag it down below and put it away.

Q. You don't know the nature of the train that was doing that switching?

A. No, sir, I don't know anything about the work that engine had to do whatever.

Q. You don't know how many cars were in that train nor where it was necessary to leave that car?

A. No, sir, I didn't know anything about what they were doing at all.

Q. Was there anything to prevent Mr. Conarty stepping off after you stepped out of his way?

A. I didn't see anything. He could have followed me right off there.

Q. Would it have taken more than a step more than you made for him to get off?

A. I don't think so.

Q. Was the step you were riding on much higher than the ground——

A. About six or eight inches above the rail.

Q. That is all he had to step to get down?

A. Yes, sir.

137 Recross-examination by Mr. CHEW:

Q. Tell the jury, Mr. Douglass, the length of that foot-board in front of your pilot on the engine?

A. How long?

Q. Yes? Mark you now, the tracks is four feet eight and a half inches broad, now how long was this foot-board?

A. Well, it is—I don't know, it is just about the length of a tie.

Q. That is about nine feet is it not?

A. About eight feet, something like that to the end of the tie.

Q. Then the foot-board in front of the engine is as long again as the track is wide, about?

A. It extends over the rail about, I should judge about eighteen inches.

Witness excused.

138 *Testimony of W. L. Corroto, Recalled.*

W. L. CORROTO recalled.

Direct examination by Mr. DAVIDSON:

Q. Mr. Corroto, I neglected to ask you if there was any other car standing on the track with that coal car?

A. Not that I know of.

Q. You didn't see any more?

A. No, sir.

Cross-examination by Mr. CHEW:

Q. You would not say there was not a box car there over at the south end of this?

A. I didn't see anything but this coal car.

Witness excused.

139 *Testimony of Roy Hetherington.*

It is agreed between counsel that the testimony of Roy Hetherington, a witness for defendant, given at a former trial of this cause, may be read to the jury and considered as the testimony of said witness in this trial, said witness at this time being absent in another State. It is further agreed that that part of the former testimony of this witness relating to a map or blue print may be marked out as no map or blue print is introduced in this trial.

Former sworn testimony as follows:

Direct examination by Mr. DAVIDSON:

Q. Mr. Hetherington, where do you live?
A. Fort Smith.
Q. What are you engaged in?
A. Switching.
Q. What experience have you had in that line?
A. Nine years.
Q. You are working for the Frisco?
A. Yes, sir.
Q. Were you working for the Frisco on the night of the unfortunate accident in which Mr. Conarty was killed?
A. Yes, sir.
Q. State to the jury, now, what time you went to work that night?
A. I went to work at eight o'clock.
Q. Who constituted your crew?
A. Barthel.
Q. What was he?
A. He was a switchman, Bert Fields was a switchman and the engineer Charlie Vogel, fireman John Gossett.

140 Q. Now, tell the jury in what part of the yard you were switching along toward midnight?
A. In the east end of the yard.
Q. What tracks are in the east end of the yards?
A. The rip tracks and coach tracks, and there are four other storage tracks down there, "1", "2", "3" and "4".
Q. Storage tracks?
A. Yes, sir.
Q. Now, what were you engaged in, I mean what character of switching were you engaged in a short time before this accident?
A. Pulling the rip track.
Q. Explain what you mean?
A. Taking cars that are O. K. off the bad order track.
Q. That is the cars that had been repaired and ready to go out?
A. Yes, sir.
Q. What did you do with them?
A. The cars that had been fixed that day, we would have to pull them every evening and then fill it up again with bad order cars.
Q. Had you pulled them off of that track?
A. Yes, sir.

The COURT: You had taken the repaired cars off the repair track and put them on what?

A. Put them distributed them around through the yards where they belonged.

Q. Now, what, if anything, did you do then?

A. After having taken those cars off the repair track, I went to the east end of track No. 2 and got fourteen or fifteen cars, I am not positive, either fourteen or fifteen bad orders.

141 The COURT: Went to the east end of No. 2?

A. Yes, sir.

The COURT: Repair tracks?

A. No, storage track.

The COURT: You say you went to the east end of No. 2 storage track, do you mean to say that you use a storage track for both disabled cars and repaired cars?

A. Yes, sir.

The COURT: You sai- you took the cars from the repair track and put them on the storage track, is that right?

A. Yes, sir.

Q. Now, where is the track upon which you had your damaged cars stored, what is the number of that track?

A. No. 2 track.

Q. Did you take the cars that were repaired off of any track, if so, what track did you take them from that night?

A. Off of this No. 2 track, those that had already been repaired.

Q. Where did you deposit those cars?

A. Some of them went into No. 2 and 3 tracks and some of them went in other parts of the yard.

Q. You left them in accordance with where they were to go?

A. Yes, sir.

Q. After having pulled the repair tracks, then what did you do?

A. I went to the east end of No. 2 and got fourteen or fifteen bad orders.

Q. Were they all bad orders?

A. Yes, sir.

Q. You went to the east end of No. 2 and got the bad order cars that were on No. 2?

142 A. Yes, sir.

Q. Was that used for a repair track or storage track?

A. Storage track.

Q. Was there anything else on No. 2 except bad order cars?

A. Yes, sir.

Q. What else?

A. Full of cars in there that went south.

Q. But it was only the bad order cars that you took out of there?

A. Yes, sir.

Q. Were they marked or designated any way?

A. They had bad order tags on them.

Q. Explain to the jury what a bad order tag is like?

A. It is a card about six inches long and four inches wide with "bad order" in large letters on it.

Q. Now, those cards were on each one of those bad order cars?
A. Yes, sir.
Q. Were they separated at one end of that track or mixed up?
A. They were all together.
Q. On the east end?
A. Yes, sir.
Q. Now, did you draw them any further than was necessary to clear the north end of the switch?
A. No, sir.
Q. After having drawn them off far enough, what did you do with the string of bad order cars?
A. Shoved them right up the main line.
Q. South?
A. South.
143 Q. What did you do with the rear car, if anything?
A. Told Bartell to cut it off on the main line up there to make a drop of the balance of the cars.
Q. Why did you cut off the rear car on the main line?
A. On account of the draw-bar being out of the west end of it.
Q. Now, you told Bartell to make a drop of the remaining cars; what do you mean by "drop"?
A. To get the cars ahead of the engine.
Q. The *engine* was then ahead of the engine?
A. Yes, sir.
Q. How did you succeed in doing that?
A. Get the cars to running pretty fast, and cut their engine off from them, the engine goes down one track, you throw the switch and let the cars down the other.
Q. Did you accomplish that drop?
A. Yes, sir.
Q. Where were those bad orders run?
A. Rip No. 3.
Q. How many cars went into Rip No. 3?
A. About thirteen or fourteen.
Q. What became of the engine?
A. It went down the main line.
Q. How far down the main line from the switch where the other cars turned off?
A. About sixty feet.
Q. Any further than just enough to clear the switch?
A. No, sir.
Q. That is the ordinary way to accomplish that?
144 A. Yes, sir.
Q. What was done with the engine as soon as this was done?
A. They started back up the main line after this bad order car we left.
Q. Did you direct them to go and get it?
A. Yes, sir.
Q. Did you learn anything of any collision with that car before or after that?
A. In a few minutes after that. Some of the boys come down and told me.

Q. Do you know at what point your engine was at the time of the collision of the other engine with this car?

A. They was going back up the main line after this car and the other engine had hit it before they got there.

Q. You don't know at just what point your engine was at the time of the accident?

A. No, sir.

Q. Explain to the jury why it was necessary to handle those cars in that way?

A. I had to get those cars by me to place them on the rip and couldn't drop this car on account of, we couldn't handle it from the west end of the car because it had no draw-bar in that end.

Q. You couldn't hook onto it from that end of the car at all?

A. No, sir.

Q. What was your purpose with reference to handling that car when you left it there on the main line?

A. I was going to couple into it at the east end and take it to the east end of Rip No. 1.

145 Q. Your engine would be ahead of the car, wouldn't it?

A. Yes, sir.

Q. You would go down the rip track pass your fourteen other cars that you had left, that you had switched off there, but on another track, you would pass those and then shove it back from the end of that switch onto track number what?

A. No. 1.

Q. These other cars were on track number what?

A. No. 3.

A JUROR: Did I understand you to say awhile ago that the repair tracks one, two and three connected with the main line on each end, you could get to them from either end of the track?

A. Yes, sir.

Q. Yes, sir?

Q. Now, you put those cars in there, you made this flying switch without any interference at all?

A. Yes, sir.

Q. With perfect safety?

A. Yes, sir.

Q. Tell the court and jury whether or not you could have handled this bad order coal car in any other way with the same degree of safety?

A. I don't see how I could.

Q. Tell the jury whether or not the other switching crew had anything to do with the handling of this coal car?

A. No, sir.

Q. Was that under your supervision?

A. Yes, sir.

146 Q. Could you handle these bad order cars without interfering with those other cars that were on track No. 2?

A. Yes, sir.

Q. How long have you worked in that yard?

A. Nine years.

Q. When bad order cars are set out and the rip tracks are full, where do you put them?
A. We generally have a storage track for them.
Q. You store them in a bunch, do you?
A. Yes, sir, all together.
Q. And you mark them do you?
A. Yes, sir.
Q. And your crew attends to handling them, does it?
A. Yes, sir.
Q. Do you mix them up promiscuously with other cars?
A. No, sir.
Q. You separate them from the cars you are using in commerce, do you?
A. Yes, sir.

Cross-examination by Mr. CHEW:

Q. How old a man are you, Mr. Hetherington?
A. Thirty-one years old.
Q. Where does your duty as switchman require you to be—your work in the yards?
A. Where is my duty?
Q. What part of the yard?
A. We work all over the yard.
Q. All over the yard?
A. Yes, sir.
147 Q. Is your crew known as the "outside crew"?
A. Yes, sir.
Q. What do you mean by an "outside crew"?
A. They do the work pulling the rip track, all the outside work.
Q. And the inside crew was the one Mr. Conarty was a member of?
A. Yes, sir.
Q. What do you mean by "inside crew"?
A. They switch these trains and make up trains and trains, when they come in they switch them and break them up.
Q. Then his duty was to break up trains when they came into the city from St. Louis and Monett, and make them up into trains for the purpose of going south?
A. Yes, sir.
Q. Now, Mr. Conarty's duty didn't require him to work on these rip tracks?
A. No, sir.
Q. Nor to have anything to do with bad order cars?
A. The only time they handle bad order cars would be when they were switching a train, they would throw bad order cars out.
Q. If the train came in with broken brake beams or anything of that kind, the car would be thrown out onto the storage track?
A. Yes, sir.
Q. After that, he had nothing to do with these bad order cars?
A. No, sir.

Q. Can you tell us about how far it was from the Arkansas Cotton Oil Mill down to the south or west end of repair track No. 1?

148 A. Which end of the Cotton Oil Mill are you referring to?

Q. From about the center from where you understand this car was at the time it killed Mr. Conarty; from that point, how far was it to the west or south switch stand of repair track No. 1; your best estimate in feet, inches or miles?

A. I should judge about—that is a hard question for me to answer.

Q. I just want to test your knowledge now, about this matter?

A. I should say it would be about 600 feet.

Q. 600 feet?

A. Yes, sir.

Q. Now, this coal car that Mr. Conarty's engine collided with had been on what track?

A. On No. 2.

Q. Storage track?

A. Yes, sir.

Q. When was it put there, Mr. Hetherington?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. When was the first time you saw this car?

A. That night.

Q. When had you been in on this storage track No. 2 before this night, with an engine?

A. The night before.

Q. Did you find any cars on it that night?

A. Yes, sir.

149 Q. How many?

A. I got enough to fill the rips and left several in there.

Q. Was that fifty or one hundred?

A. I should judge twenty or twenty-five cars.

Q. Did you clean the track up at that time?

A. No, sir.

Q. How many cars did you leave on it?

A. Ten.

Q. Who put these thirteen or fourteen cars that you have been talking about, on that track?

A. The day crews.

Q. When did you first notice that number of cars on the track; I am talking about storage track No. 2, you say the day crew put them on; when did you first notice them?

A. That night when I went after them.

Q. And that is the first time you had noticed this coal car?

A. Yes, sir.

Q. Do you know who put it there?

A. I don't know.

Q. The proof shows that this car came into this yard on the 9th of November, and was here on the 19th, and Mr. Conarty was hurt on the morning of the 13th, or right after midnight of the 12th; where was this car on the 11th?

A. I don't know.
Q. Did you go in on track No. 2 on the 11th, with your engine?
A. Yes, sir.
Q. How many cars were there then?
150 A. I don't know.
Q. About how many?
A. I would not say. That track will hold sixty cars.
Q. It will hold sixty cars?
A. Yes, sir.
Q. From one clearing post to another?
A. Yes, sir.
Q. That clearing post is nothing but a piece of timber put down between the tracks down there for the purpose of indicating to the switchmen that this is a point where a car may be safely left?
A. Yes, sir.
Q. How far from this clearing board was the clearing board at the east end of No. 2 track; do you say between these two clearing posts that track will hold about sixty-five cars?
A. About sixty cars.
Q. Did you go in on this track No. 2 on the evening *of the evening* of the 10th of November?
A. Yes, sir.
Q. How many cars were on it then?
A. I don't know.
Q. How many bad order cars did you take off of track No. 2 that day?
A. I couldn't tell you.
Q. When was the draw head put into the car; it didn't get out of here until the 19th?
A. It must have been put in on the 13th then.
151 The COURT: Do you know what day it was put in?
A. I don't know what time it was put in, no, sir.
Q. Where was it on the 17th day of November?
A. On the rip track.
Q. Where was it on the 16th?
A. Rip track.
Q. Did you examine it there?
A. No, sir.
Q. How do you know it was there?
A. I saw it.
Q. Which rip track was it on?
A. On No. 1.
Q. How many other bad order cars did you see on that track?
A. It was full.
Q. Well, how many?
A. Ten or twelve.
Q. Now, let me see, if I understand you, when you went to pull the cars off of storage track No. 2 your crew went to the switch at the extreme north end of that side track No. 2, did it?
A. Yes, sir.
Q. And headed your engine in there?

A. Backed it in there.
Q. Backed it against the cars?
A. Yes, sir.
Q. And coupled onto them and pulled them out on the main line?
A. Yes, sir.
Q. To get in there what did you have to do with your engine?
A. I came down the main line and backed in there.
152 Q. You had nothing but the engine when you went down there?
A. That's all.
Q. Then your switchman threw this switch and you back in on No. 2 track?
A. Yes, sir.
Q. Then what did you do?
A. Went down in here and got the bad order cars.
Q. After you hooked onto them what did you do?
A. Come back up the main line to get up here to make a drop of them into the main track.
Q. And you left the coal car in question at a point about midway of the Arkansas Cotton Oil Company?
A. Yes, sir.
Q. Did you leave a box car with it?
A. No, sir.
Q. When you left this car here what did you do with the other cars?
A. Dropped them down into the rip track.
Q. How did you do that?
A. Made a run of them.
Q. What track were you using to make that drop?
A. Had my engine down the main line.
Q. In other words, you got back up here and started your engine with a good deal of steam and force, then uncoupled the engine from the cars and threw the switch and let the cars run in on the side track, that is what you call a flying switch?
A. Yes, sir.
Q. And then you left this coal car up here (indicating)?
A. Yes, sir.
153 Q. And you didn't leave a box car up there?
A. No, sir.
Q. When you came back there you found the draw-head in the east end of the coal car all right; it would couple by the impact?
A. Yes, sir.
Q. Then you intended to hook onto this car at the east end and shove it into a switch, where did you mean to shove it?
A. Right down here (indicating) and shove it into No. 1.
Q. And go how far?
A. Back it in on No. 1.
Q. If you were going to do that what was the necessity of your leaving it on the main line?
A. I could not handle it from the west end of the car.
Q. You didn't change the end of the cars?

A. No, sir.
Q. Then you put it down here, you left it in the same position?
A. Yes, sir.
Q. Now what was the necessity of bringing these cars up this far?
A. Had to get them far enough to make a drop.
Q. How many did you have?
A. Fourteen or fifteen.
Q. They are only thirty-four feet in length?
A. They run thirty-six to forty.
Q. Then you had about 560 feet of cars, did you?
A. About fourteen or fifteen cars.
Q. How many cars did you find on rip track No. 2 when you went in there that night?
154 A. I don't know just exactly how many.
Q. What track did you put this string of bad order on?
A. On No. 3.
Q. How many cars did you find on that track?
A. It was clear.
Q. Entirely clear?
A. Yes, sir.
Q. How many repairers do they keep there in the yard?
A. I don't know.
Q. How many did you see?
A. I didn't see any; I work nights.
Q. Do they work night?
A. No, sir.
Q. Did you ever work there in the day time?
A. Yes, sir.
Q. Do you know how many repairers they kept there at that time?
A. Ten, twelve or fifteen men.
Q. If this car came in here on the morning of the 9th of November why was it, it was not put on one of these repair tracks the next day?
A. I don't know.
Q. Did you know this car was in this condition when you left it up there on that track?
A. In what condition?
Q. That the draw-head was out?
A. Yes, sir.
Q. Did you know where Mr. Conarty and his engine was at that time?
155 A. I know they were in the yards, in the east yards but I don't know what they were doing.
Q. Did you know they were likely to come down that main track at any moment?
A. Yes, sir.
Q. How long after Mr. Conarty was injured, after this collision was it before you went up there?
A. Just as soon as I found out about it.
Q. Well, how long was that?

A. About five or ten minutes.
Q. Where was your engine at the time you went up there?
A. Up there where it occurred.
Q. Who was with it?
A. Fireman and yardmaster.
Q. How far from the place where Conarty was hurt?
A. About ten feet of the car.
Q. When you got up there?
A. Yes, sir.
Q. Was a number of people there at that time?
A. Just the crew.
Q. Was this wooden legged negro up there?
A. No, sir.
Q. You knew he worked there at the mill, didn't you?
A. Yes, sir.
Q. You had seen him around there at night, hadn't you?
A. Yes, sir.
Q. But you didn't see him there that night?
A. No, sir.
Q. Did you ever repair a car?
156 A. No, sir.
Q. You don't know anything about the repairing of them?
A. No, sir.

Cross-examination by Mr. DAVIDSON:

Q. Mr. Hetherington, did you go any further on the main line than was necessary to do that switching when you pulled those cars out?
A. No, sir.
Q. No further south on the main line than was necessary in order to make that running switch?
A. No, sir.
Q. Could you have gone in on that line and pulled this line of cars out on the main line and pushed them in with the engine, if not, why not?
A. I couldn't get into this track.
Q. Well, if you could, could you have pushed them out with that coupling out?
A. Not on the west end of them, no, sir.
Q. You could not hook onto that end at all?
A. No, sir.
Q. And you had to handle it from the east end, didn't you?
A. Yes, sir.
Q. State whether or not you have a book of rules?
A. Yes, sir.
Q. Are these put in the hands of the switching crew?
A. Yes, sir.

157 (Rule 93 in the book of rules is read over to witness as follows:

"Within yard limits the main track may be used protecting against first class trains. Second and third class and extra trains must

move within yard limits prepared to stop unless the main track is seen or know- to be clear.")

Q. That rule was in force at that time?
A. Yes, sir.
Q. And had been for quite a period of time before that, had it?
A. Yes, sir.
Q. Were you inside of the yard limits?
A. Yes, sir.
Q. Were you switching in the ordinary way?
A. Yes, sir, we were.
Q. When you went back down there, were you on that engine after Conarty was hurt?
A. No, sirm I walked up there.
Q. Where was your engine when you got there?
A. It was up there with this car.
Q. How long from the time you left the car standing there until your engine was back there to pull it away?
A. Four or five minutes.
Q. How long before it did pull it out after the engine got back there?
A. I judge about thirty minutes.
Q. Your engine and this car stayed there on the track about thirty minutes after the accident happened?
A. Yes, sir.
Q. Was there any box car there at that time?
158 A. No, sir, none whatever.
Q. Was there any box car on the main track that night standing still at any time or do you know, up to the time of this injury?
A. No, sir, except the box cars we had in switching up there.
Q. But they *are* standing still?
A. No, sir.
Q. You passed over this track going north before the accident occurred about five minutes and there was none there then?
A. No, sir.
Q. None when you came back?
A. No, sir.
Q. Any standing on the track close to this?
A. On the next track to it.
Q. Which side?
A. East side.
Q. Standing alone or with other cars?
A. There were several cars along up there.
Q. Were they attached to each other?
A. Yes, sir.
Q. There were bunches of cars there at various placed on those side tracks?
A. Yes, sir.
Q. When those bad order cars are bunched that way, stored there, all of the employees understand that they are not to be interferred with unless the men are sent there for that purpose?
A. Yes, sir.

Q. Do you handle them in connection with other cars at all after they have been stored?

159 A. No, sir.

Q. Had you previously handled this car?

A. No, sir, never seen it before.

Q. You don't know whether the other crew handled it or not, whether the day crew or the night crew, except you know yours did not?

A. No, sir.

Q. A car that is damaged is set out on the storage track?

A. Yes, sir.

Q. If the repair track is clear you put all you can on the repair track?

A. Yes, sir.

Q. In leaving them on the repair tracks do you leave them all in a bunch?

A. No, sir, we separate them about four or five feet apart so the men can work on them.

Q. If that engine had been on the other end of that train could you have done that; that is, if this bad order car had been there?

A. No, sir.

Q. You couldn't have pulled them in so as to let the workmen get in?

A. No, sir, couldn't have coupled onto it.

Recross-examination by Mr. CHEW:

Q. Rule 93 which has been read into the record by Major Davidson out of the book of rules—now, had you any other rules there in regard to the duty of switchmen in the yards?

160 A. I don't remember.

Q. Now, Rule 93 was put there not for the benefit of switchmen but for trainmen?

A. Yes, all concerned.

Q. In this book of rules, can you turn to the rule that prohibits you from making flying switches?

A. Don't believe I can.

Q. Did you have a rule of that kind in effect at that time?

A. Never seen it.

Q. Did you eat your supper that night, lunch at twelve o'clock?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. You know this young man, Birchfield?

A. Yes ,sir.

Q. Had he eaten his supper that night before Mr. Conarty was injured?

A. He had not.

Q. When did you get your midnight lunch?

A. About two o'clock.

Witness excused.

161 Rule 93 on page 25 of the book of rules of the transportation department taking effect February 1st, 1909, read in evidence as follows:

"Within yard limits the main track may be used protecting against first class trains. Second and third class and extra trains must move within yard limits prepared to stop unless the main track is seen or known to be clear."

162 *Testimony of Robert Birchfield.*

ROBERT BIRCHFIELD called as a witness on part of defendant after having been first duly sworn, was examined in chief by Mr. Davidson, and testified as follows:

Q. Mr. Birchfield, where do you reside?
A. Fort Smith.
Q. What have you been engaged in?
A. Switchman for the Frisco.
Q. Were you on duty the night that Mr. Conarty was killed?
A. Yes, sir.
Q. Which crew were you with?
A. What we call the "outside engine."
Q. Was that the one Mr. Conarty was in?
A. No, sir.
Q. The other one?
A. Yes, sir.
Q. Explain to the jury whether or not you took out some cars, whether or not you switched on the repair tracks to clear them?
A. Yes, sir.
Q. You distributed the cars on the repair track, did you?
A. Yes, sir.
Q. After the repair track was emptied, tell the jury whether you went in the storage track and got some cars?
A. We had what we call "Repair track No. 2," I believe it is No. 2, went to the east end of the yard and got a bunch of bad order cars where they had been stored and placed them in the place of these ones we had taken off.
Q. Why did you go the east end instead of the west, or do you know?
163 A. We could handle the cars easier.
Q. You pulled them out at the east end? How many cars were in that string, do you remember?
A. No, sir, I don't remember.
Q. Was there quite a bunch?
A. Yes, sir, there was quite a bunch of cars; we got them off of different tracks.
Q. You backed off the main line with them?
A. Yes, sir.
Q. Did you leave any car on the main line with them?
A. Yes, sir, left one.
Q. What kind of a car was it?

A. Coal car.
Q. What did you do with the other cars after leaving that coal car there?
A. Dropped them into the repair track.
Q. Did you return to get that car?
A. Yes, sir.
Q. Was there any other car left there with that coal car?
A. No, sir.
Q. What did you return with?
A. Light engine.
Q. When did you learn of that injury?
A. Well, about five or six minutes after we had made this drop.
Q. Then you went on back up there where this car was and found the parties there, did you?
A. Yes, sir.
164 Q. Were you in the act of returning for this car when the injury occurred?
A. Yes, sir.
Q. You were the brakeman, were you?
A. I was switchman.

Cross-examination by Mr. CHEW:

Q. Mr. Birchfield, how long have you been switchman there in the yards?
A. Six or seven years.
Q. What was the ordinary and usual hour for the crew to pull the repair track and put the disabled cars on it?
A. Have no regular hours. At night time.
Q. No regular time at all?
A. No, sir.
Q. Is that usually done about six or seven o'clock in the evening, ordinarily?
A. No, sir.
Q. Well, ordinarily, what time do you do it?
A. Well, most any time we can get to it.
Q. As a rule, about what time of night do you pull the tracks?
A. Well, ten thirty, eleven, twelve, three or four, most any time of the night we get to it.
Q. Now, you took this string of cars out of track No. 2, that was the track you used for storing all kinds of cars on, was it not?
A. No. 2?
165 Q. Yes, I am talking about the switch track down there the east or north end of the track where you got the bunch of cars off of?
A. Yes, sir.
Q. You put all kinds of cars, good cars and bad cars on that track?
A. Good cars on one end and bad cars on the other.
Q. What was the necessity of putting that coal car up there where Mr. Conarty ran into it?
A. That is the only way we could handle it, to get it to the repair track.

Q. You carrier it about three quarters of a mile, didn't you, from where you got it?
A. I don't remember how far it was.
Q. It was about that far, wasn't it?
A. Yes, sir.
Q. Why did you carry it up there?
A. Carried it up there to make a drop of these cars we had ahead of it.
Q. How far were you from the switch back of the engine you were going there to make the drop?
A. Eight or ten car lengths. We made a drop of them to let them go in on the repair track.
Q. Is it true the reason why you put this string of cars up there and cut the cars away from the coal car was for the purpose of letting the engine on train 735 pass you and go into the roundhouse?
A. We dropped the cars, we had made a drop of twelve or thirteen——
166 Q. Why was it you put this coal car up there where Mr. Conarty was injured?
A. Because we shoved back there to make a drop of these cars. We had done made the drop before 735's engine was cut off of its train.
Q. Is that true?
A. Yes, sir.
Q. Is that as true as anything else you have testified about?
A. Yes, sir.

Redirect examination by Mr. DAVIDSON:

Q. You had just the one car there at that time?
A. Yes, sir. 35's engine come out and we shoved the cars into the rip track after we had heard of the injury.
Q. Those tracks don't extend far beyond the shops, do they?
A. No, sir, not very far.

Witness excused.

167 *Testimony of C. Vogel.*

C. VOGEL called as a witness on part of defendant, after having been first duly sworn, was examined in chief by Mr. Davidson, and testified as follows:

Q. Mr. Vogel you were on the engine as engineer that was doing that switching that night?
A. Yes, sir.
Q. When you left that car on the main line, you went back after it?
A. Yes, sir.
Q. How many cars were there?
A. Just that one coal car.
Q. Just the one car?
A. Yes, sir.

Witness excused.

168 Schedule of earnings each month of W. G. Conarty, during the time he worked for defendant introduced in evidence by defendant showing that he worked in all twenty seven months and after deductions his net average per month during these twenty seven months was $81.03.

Defendant rests.

169 Carlyle's Expectancy Table introduced in evidence by plaintiff showing that a man 38 years of age has an expectancy of 28 96-100 years. A man 36 years of age has an expectancy of 30 32-100 years and a man 32 years of age has an expectancy of 33 3-100 years.

170 *Testimony of Mrs. Fanny Conarty, Recalled.*

Mrs. FANNIE M. CONARTY recalled.

Direct examination by Mr. CHEW:

Q. The railway company, Mrs. Conarty, has introduced some pay rolls here showing that your husband began to draw money from them in 1908 and it seems from the pay rolls that he was not at work all the time for the railway. At the time he was not at work for the railway, did he have other employment?

A. He did as I stated to this jury before. On a line of railroad work before you get regular work you have got to work extra. When he found out there was no work in this yard for him, he still held his position and worked out at other places.

Q. What other kind of work?

A. I didn't charge my memory with this, not thinking that my husband would be taken from me, but he worked for the sand company at Fort Smith, at the carpenter's trade and did anything to be at home so he would not have to leave his family.

Witness excused.

Which was all of the testimony offered upon the trial of this cause.

171 *Motion to Compel Plaintiff to Elect.*

After all the testimony was in the defendant filed a motion in words and figures as follows (caption omitted).

"The defendant, not waiving its right under its demurrer and protesting against being required to answer further, moves the Court to require the plaintiff to elect whether or not she will prosecute her cause of action as administratrix for compensation for the next of kin or whether or not she will prosecute the cause of action for the pain and suffering endured by W. G. Conarty on account of the injuries alleged."

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
By B. R. DAVIDSON, *Attorney.*

Which motion coming on to be heard was, by the Court overruled, to which ruling of the Court the defendant excepted.

172 *Defendant's Requested Instructions.*

And thereupon, the defendant moved the Court to instruct the jury as follows:

(A) The evidence in this cause does not warrant a recovery on behalf of plaintiff. You will therefore find the issues for defendant. (Refused.)

(B) Under the evidence in this cause it was not negligence to leave this car on the main line. (Refused.)

(C) I charge you that under the undisputed evidence in this cause, the car was not at the time of the injury engaged in interstate commerce. You will therefore find the issues for defendant. (Refused.)

(To the refusal of the Court to give each and every one of said instructions, defendant excepted.)

The court, having refused the above instructions, the defendant moved the Court to instruct the jury as follows:

I.

I charge you that under the undisputed evidence in this cause, the defective condition of the car was not the proximate cause of the injury. (Refused.)

II.

If you find from the evidence that the car was being shifted from a track used for storage of bad order cars, to the track upon which repairs were made; that while upon the main line, the deceased was injured by his engine colliding with this car, defendant would not be liable. (Refused.)

173 III.

If you find from the evidence that the car in question was loaded with coal at Huntington, Ark. in the State of Arkansas and was billed to some point in the State of Texas; that after it had been so loaded, it was damaged in some way; that the draw-bar and couplings were broken so that it could not be safely forwarded in the train; that the employes of the railroad company, for the purpose of repairing said car caused the same to be transported to Forth Smith, a point where repairs of this character were made; that said car had been placed on a siding near the repair track which was used at this time only for storing cars that were in bad order; that the repair tracks where repairs were made were full of damaged cars at the time; that in the regular course of business, it became necessary for the yard switching crew to move said car onto the repair track in order to have the car repaired; that in so doing the switch engine in the city of Fort Smith placed it upon the main track in the usual and ordinary way; that the crew handling it in the manner in which they were handling it could have placed it upon the repair track without any danger to said

crew; that an order of the railroad company had been made and promulgated long prior to this time which was read to you as Rule No. —, then I charge you that there would have been no negligence in leaving said car upon the main line for said purposes. (Refused.)

IV.

If you find from the evidence that the car in question had been loaded with coal at Huntington and had been consigned to
174 some point in Texas, had been damaged so that it could not be transported in the trains to said point; that defendant had sent it to Fort Smith, a point where such repairs were made for the purpose of having it repaired; that said car had been delivered in the yards at Fort Smith and had been placed upon a track used only to store damaged cars on and was waiting to be repaired in its order, and was being shifted for that purpose, then I charge you that said car was not engaged in interstate commerce at the time of said injury. (Refused).

V.

If said car was not engaged in interstate commerce at the time of the injury, the defendant would not be liable for any injury inflicted on account of any defect in the coupling. (Refused).

VI.

I charge you that the defective coupling or damaged condition of the coupling was not the proximate cause of the injury to deceased. (Refused).

VII.

I charge you that no negligence has been shown upon the part of the switching crew that moved the car in question and left it upon the main line and that the leaving of said car upon the main line was not negligence. (Refused).

VIII.

If you find from the evidence that a freight train came in
175 facing deceased and the trainmen on the engine on which he was riding, as it was approaching the car standing on the main line; that the electric headlight of the train coming in so blinded the employes on the engine that they did not see the freight car standing on the main line, and this engine was thereby caused to collide with it, thereby causing the injury, and that said collision was caused by the fact of the electric light blinding the employes on the engine so that they did not see the car standing on the main line in time to avoid the injury, then the injury would be the result of an accident and not of negligence and plaintiff cannot recover. (Refused).

IX.

I charge you that you will not consider the fact of the damaged condition of the car standing upon the main line as constituting negligence. (Refused).

X.

If you find from the evidence that deceased's disobedience of the rules of the company was the cause of the injury, you will find for the defendant. (Refused).

XI.

If you find from the evidence that deceased could have easily stepped from the foot-board and have avoided the injury and he negligently failed to do so, he caused or contributed to the injury and plaintiff cannot recover. (Refused).

176

XII.

If deceased negligently remained on the foot-board when no duty required him to do so and was thereby injured, plaintiff cannot recover. (Refused).

XIII.

If you find for the plaintiff you should take in consideration the fact that such sum as you find will be payable in the future at intervals as deceased might have contributed them, and in estimating the value of the contributions he might have made in the future you should take the present value, and in determining the amount, you should not consider the injured feelings, or sentiment of his family. It is only for the pecuniary loss that the law makes compensation. (Refused).

(Modification asked.) The compensation as to the children should be limited to their minority. (Refused.)

XIV.

If you find that the defendant was guilty of any act that rendered it liable, then you will consider whether or not deceased was guilty of any act of negligence that caused or contributed to cause his injury. If you find that deceased negligently remained on the foot-board when he knew that the engine was going to collide with a car, when no duty required him to do so, then he was guilty of contributary negligence.

(To the refusal of the court to give each and every one of said instructions, defendant excepted.)

177 And thereupon the Court instructed the jury as follows:

Court's Instructions.

1.

Gentlemen of the jury: In this case the coal car with which the engine collided was, within the meaning of the Act of Congress, an interstate car, and was required to be equipped with safety appliances of an automatic coupler and a draw-bar of uniform height. It is admitted that the car was not equipped as required by the Safety Appliance Act of Congress with draw-bar and automatic coupler.

2.

If this want of equipment as required by the Safety Appliance Act was the proximate cause of the injury and death of Conarty, the defendant is liable and you should so find. If the want of equipment as above indicated was not the cause of the injury and death of Conarty, or if it was a cause but was not the proximate cause of the injury and death of Conarty, the defendant is not liable and you should so find. The proximate cause is the cause which operating in its usual, ordinary and reasonably to be expected and anticipated course produced the injury complained of. In this case if the want of equipment as above indicated caused the injury and death of Conarty in its usual, ordinary and reasonably to be expected operation, then it was the proximate cause of the injury. But, if the want of equipment as above indicated caused the injury but did not cause it in the usual, ordinary and reasonably to be expected operation and course, then it is not the proximate cause and defendant is not liable. If the injury sued for was one that could not ordinarily, usually and reasonably be expected from
the want of equipment — was not the proximate cause of the
178 injury and the defendant is not liable.

3.

If you find for the plaintiff, you will assess her recovery at such a sum as, from the evidence, will fairly compensate the widow and children for the pecuniary loss, if any, which they have sustained by reason of the death of Conarty; and in this may be included the value of the paternal care and instruction, if any, which the minor children may have lost by reason of the death of Conarty.

4.

You will also, if you find for plaintiff, state and find such an amount as, in your judgment from the evidence, will be a fair compensation for the conscious pain and suffering, if any, which Conarty endured after the injury and as a consequence thereof prior to his death.

5.

If you find for the defendant, you will so state in your verdict.

6.

You are the sole and exclusive judges of the credibility of the witnesses and of the weight to be attached to their testimony. In determining what weight you will give to the testimony of a witness,
you may take into consideration the witnesse's interest, if he
179 has any, in the result of the trial, his bias or prejudice, if any, for or against either party, his means of knowing that about which he testifies, the reasonableness or unreasonableness of his statements and applying your knowledge of human actions, motives and affairs, you will find the truth and present that in your verdict.

7.

Negligence on the part of Conarty means the want on his part, if it existed, of reasonable and ordinary care for his own safety. If Conarty was wanting in ordinary and reasonable care for his own safety in remaining on the foot-board after discovering the coal car on the track and such want of care was the primary cause of the injury and death of Conarty, the plaintiff cannot recover. But, if such want of care, if it existed, was not the primary cause but only contributed to the injury sued for, then plaintiff is not thereby barred from recovery. In such case the negligence of the company sued for, if it existed, and proximately caused the injury and death of Conarty and the contributory negligence of Conarty, if it existed, may be considered and the amount of recovery, if any, should be diminished in proportion as the negligence of Conarty contributed to the injury.

8.

If Conarty discovered the car on the track and that it was without coupling appliances and then did not use ordinary and reasonable
care for his own safety to avoid the injury, then such want
180 of care was the primary cause of the injury and death and the plaintiff cannot recover. But, if he discovered the car on the track but did not discover that it was without coupling appliances, then his want of ordinary care for his own safety, if it existed, was not the primary cause of his injury and death, and if defendant was negligent in the particulars assigned in the complaint and this want of care on its part proximately caused or contributed to cause the injury and death sued for, the negligence of Conarty, if it existed, was what is called contributory negligence and should diminish proportionately plaintiff's recovery if you find for her.

9.

The only assignment of negligence in the complaint is the use of the coal car at the time of the injury without the safety appliances required by Act of Congress, and no other acts or omissions of de-

fendant's servants can be made the foundation of liability in this cause.

(To the giving of said instructions and each and every one thereof, the defendant, at the time objected and excepted).

Defendant objected to the giving of the first instruction because the facts of the case did not warrant it and because the car was not at the time of the accident engaged in Interstate Commerce and the defective condition of the draw-bar, as a matter of law, was not the proximate cause of the injury.

Objected to the giving of the second instruction because the facts of the case did not warrant it and because the undisputed
181 facts of the case showed that the defective condition of the draw-bar, as a matter of law, was not the proximate cause of the injury; that it was the duty of the Court to declare, under the evidence whether or not this was the proximate cause and that the question of proximate cause should not have been left to the jury.

Objected to the giving of the fourth instruction because the Court submitted both the action for pain and suffering and compensation to next of kin to the jury when the law requires that an election should be made as to which action plaintiff will prosecute.

Objected to the giving of the seventh instruction because it incorrectly stated the law as to contributory negligence.

Objected to the giving of the eighth instruction because it required that Conarty should have discovered that the car was without a coupling appliance before he was required to use ordinary and reasonable care for his own safety; that it exonerated Conarty from contributory negligence if he failed to discover that the car was without coupling appliances when there was no intention to couple to said car, and incorrectly stated the law of contributory negligence.

After the instructions of the court and argument of counsel, the jury retired to consider of its verdict, and afterwards and upon the — day of June, returned into open Court the following verdict, to-wit:

"We, the jury, find for the plaintiff and assess the damages at ten thousand dollars, $10,000.00.

GEORGE HARRISON, *Foreman.*

182 *Motion for New Trial.*

Thereupon, the defendant filed its motion for a new trial which motion (with caption omitted) is in words and figures as follows:

The defendant moves the court to set aside the verdict and grant a new trial in this cause for the following causes:

(1.)

The court erred in refusing to transfer this cause to the Federal Court.

(2.)

The Court erred in overruling the demurrer to plaintiff's complaint.

(3.)

The Court erred on the trial in allowing Mrs. Conarty, who was the wife and also the administratrix, to testify as to contributions made by her husband to herself; all of which was objected to at the time by the defendant.

(4.)

The Court erred upon the trial in allowing the witnesses to give their opinions as to the effect of the coupling with a car that was equipped with a perfect automatic coupler, and in admitting proof as to the effect of a want of an automatic coupler in a collision when no coupling was intended to be made; all of which was objected to and excepted to by defendant at the time.

(5.)

The Court erred in refusing to require the plaintiff to elect whether she would prosecute her cause of action for pain and suffering
183 of deceased, or for compensation to the next of kin and in overruling defendant's motion to that effect after the testimony had been concluded.

(6.)

The Court erred in giving instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9, to the giving of each of said instructions, the defendant at the time objected and excepted.

(7.)

The Court erred in refusing to modify instruction numbered Four as moved by the defendant.

(8.)

The Court erred in refusing to give each one of instructions (A), (B) and (C), and instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, asked by the defendant.

(9.)

The verdict is contrary to and not supported by the evidence.

(10.)

The verdict is contrary to law.

(11.)

The verdict is excessive and not warranted by the evidence.

Wherefore, defendant prays that the judgment may be set aside and that a new trial be granted herein.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
By B. R. DAVIDSON, *Attorney.*

184 *Overruling Motion for New Trial.*

Which motion, coming on to be heard, was, by the Court, overruled, to which ruling of the Court, the defendant at the time excepted and prayed an appeal to the Supreme Court, which appeal was, by the court granted and ninety days were given in which to prepare a bill of exceptions, and this bill of exceptions presented within said time containing all of the evidence given in this cause, all of the instructions given by the court, the instructions asked by defendant and refused by the court, a motion for a new trial and all of the acts and doings in said cause is, by the court, signed, sealed, ordered filed and ordered to be made a part of the record in this cause.

Witness my hand and seal as judge of the 15th Judicial Circuit of Arkansas this 15th day of August, 1912.

JEPTHA H. EVANS,
Judge 15th Circuit of Arkansas,

Endorsed: Filed, August 24th, 1912. A. Hays, Clerk.

185 *Fee Bill.*

To this transcript certificate and seal	$54.50
Clerk's costs	11.50
Sheriff's costs	6.25
Jury Tax	3.00
Witness Fees	81.00
	$156.25

186 *Clerk's Certificate.*

COUNTY OF CRAWFORD:

I, the undersigned, A. Hays, Clerk of the Crawford Circuit Court, do hereby certify that the hereto attached One Hundred and Sixty Five Pages, and pages A-1 to A-7, pages B-1 to B-5, Pages C-1 to C-4, and 4*a* to 4-*c*, contain a full and complete copy of the records and judgment and papers now on file in the office of the Crawford Circuit Court, in the cause mentioned in the Caption hereto attached; in testimony whereof, I have in said County and State, on this the 3d day of Sept. 1912, hereunto, affixed my official hand and seal of office.

[SEAL.] A. HAYS, *Clerk.*

187 *Filing in Supreme Court.*

In the Supreme Court of Arkansas.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant,
vs.
FANNIE M. CONARTY, Administratrix of the Estate of W. G. Conarty, Deceased, Appellee.

Appeal from the Crawford Circuit Court, June, 1912, Term.

The St. Louis & San Francisco Railroad Company would respectfully pray an appeal in the above entitled cause tried and determined on the 28th day of June, 1912.

ST. LOUIS & SAN FRANCISCO
RAILROAD COMPANY,
By B. R. DAVIDSON, *Attorney.*

Appeal granted September 27, 1912.

P. D. ENGLISH, *Clerk,*
By W. P. SADLER, *D. C.*

188 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1912, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 9th day of December, 1912, a day of said term:

Record Entries.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant,
vs.
FANNY M. CONARTY, Administratrix of the Estate of W. G. Conarty, Deceased, Appellee.

Appeal from Crawford Circuit Court.

On request of the appellee this cause is set by the Court for oral argument *of* December 23rd, inst.

And on the 23rd day of December, 1912, the following proceedings were had in said cause (caption omitted), to-wit:

This cause being regularly called, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the record and the briefs filed and upon oral argument, and is by the Court taken under advisement.

189 And on the 3rd day of February, 1913, the following proceedings were *said* in said cause (caption omitted), to-wit:

This cause came on to be heard upon the transcript of the record of the circuit court of Crawford County, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things, affirmed with costs.

It is further considered that said appellee recover of said appellant all her costs in this Court in this cause expended, and have execution thereof.

And on the 17th day of February, 1913, the following proceedings were had in said cause (caption omitted), to-wit:

Comes the appellant by attorney and files a petition for rehearing and prays for two weeks' time in which to prepare and file a supporting brief, which time is by the Court granted.

190 And on the 3rd day of March, 1913, the following proceedings were had in said cause (Caption omitted), to-wit:

The petition for rehearing filed herein being called, the same is now submitted with the briefs filed, and is by the Court taken under advisement.

191 In the Supreme Court of Arkansas.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant,

vs.

FANNY M. CONARTY, as Administratrix of the Estate of W. G. Conarty, Deceased, Appellee.

Petition for Rehearing.

Not waiving its right to have this cause removed nor to require the plaintiff to elect which cause of action she should prosecute nor any of the other points made in this case, the appellant respectfully petitions the court for a re-hearing in the above entitled cause.

I.

The Court erred in holding:

(A). That deceased was at his post of duty or required to be on the foot-board for the purpose of coupling the engine to cars.

(B). That duty required the deceased to be upon the foot-board or between these cars at the time of the collision.

II.

The Court erred in holding:

(A). That the car was still in use for the purpose of interstate

Commerce within the meaning of the Safety Appliance Act
192 when deceased's engine collided with it.

(B). That the Court erred in holding that it was the duty of the company while moving this car for repairs only and after it had been stored with bad order cars to see that it was properly equipped with automatic couplers in accordance with the statute.

(C). The Court erred in holding that under the amended act of Congress that the moving or hauling of such car "should be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or connection with the movement or hauling of such car with equipment which is defective or insecure."

(D). As there would have been no liability under the former act—hence, the amendment could not relieve from a liability that did not exist and the amendment was not intended to create a liability.

(E). The death of the employee was not "caused" by reason of the hauling of such car with equipment that was defective or insecure.

(F). The deceased employee was not injured in connection with the movement or hauling of such care within the meaning of the law as he had nothing whatever to do with its movement but only collided with it standing upon a track.

193 (G). The court erred in holding that this car was being hauled or used on this line at the time deceased collided with it.

III.

The Court erred in holding that the defective condition of the car was the proximate cause of the injury.

IV.

The Court erred in holding that the testimony of the plaintiff administratrix was admissible as to transactions with the deceased.

Wherefore, appellant respectfully prays that a new hearing be granted to plaintiff in this cause.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
By B. R. DAVIDSON, *Attorney.*

I, B. R. Davidson, attorney for appellant in the above entitled cause do hereby certify that I have examined the opinion in said cause and in my judgment the rulings of the court are erroneous in the particulars above set forth and I further certify that I think the court has misapprehended the extent of the ruling in the case of United States v. Clark, 96 U. S. p. 37 upon which the opinion is based in this case as to the admissibility of evidence and I do not

feel that said opinion bears out the conclusions of the court and I respectfully ask that the petition for a re-hearing be granted.

B. R. DAVIDSON.

Endorsed: Filed Feb. 17, 1913. P. D. English, Clerk, By W. P. Sandler, D. C.

194 And on the 10th day of March, 1913, the following proceedings were had in said cause (caption omitted), to-wit:

Being fully advised, the petition for hearing filed herein is by the Court overruled.

195 *Opinion.*

In the Supreme Court of Arkansas, February 13, 1913.

St. L. & S. F. Ry. Co.
v.
Conarty.

Opinion.

McCulloch, *C. J.:*

This action was instituted by Fannie M. Conarty, as administratrix of the estate of W. G. Conarty, deceased, against the St. Louis & San Francisco Railroad Company, to recover damages, for the benefit of herself, as widow, and her children, as next of kin of said decedent, on account of the death of said decedent, which is alleged to have resulted from the wrongful act of defendant in using a car not equipped with safety appliances required by the Federal statute. It is alleged that the car in question was being used in interstate commerce, and that decedent was employed by defendant and was engaged at the time of his injury and death in handling cars in interstate commerce. The action was instituted under the Act of Congress known as the Employers' Liability Act, as amended by the Act of April 5th, 1910, and is based upon the Safety Appliance Act. Damages are sought to be recovered on account of loss of contributions, and also on account of the decedent's right of action for suffering endured by him. The plaintiff recovered a judgment below for damages in the sum of $10,000.00, and defendant appealed.

Defendant presented its petition and bond for removal to the Federal Court on account of diversity of citizenship. The petition was denied, and that ruling is assigned as error.

The question of the right to remove a case on account of diversity of citizenship in an action instituted under the Employers'
196 Liability Act of Congress was presented and fully argued in the case of Kansas City Southern Ry. Co. v. Cook, 100 Ark. 467, and it was decided against the present contention of defendant. We held that the Act of Congress expressly provides that there

shall be no removal and that the prohibition is valid. We adhere to that conclusion.

The next contention is, that the statute does not permit a recovery both for pecuniary loss to the widow and next of kin and for the pain and suffering endured by deceased for the recovery of which the right of action of the deceased survived. A motion was made below, treating the complaint as setting forth two causes of action, and asking that plaintiff be required to elect which of them she would prosecute. The Federal statute as originally enacted gave a cause of action, first, to the injured employee, which, of course, included as elements of damage pain and suffering endured as well as pecuniary injury resulting from loss of earnings; and, next, to the widow and next of kin in the event of the death of such injured employee, the measure of damages being the pecuniary loss sustained by such widow and next of kin on account of such death. It was held that the cause of action given to the injured person did not survive his death but died with him, and that a new cause of action then arose in favor of the personal representative for the benefit of the widow and next of kin. Fulghum v. Midland Valley Rd. Co. 167 Fed. 660; Welch vs. New York, N. H. & H. Rd. Co. 173 Fed. 494. The result was that, if the injured person died after bringing suit, his personal representative could not substituted to prosecute the suit for the benefit of the widow and next of kin, but had to bring a new action for that purpose,
197 and the pain and suffering endured by the injured person was not an element of recoverable damages sustained by the widow and next of kin and could not be recovered for their benefit. To change this condition of the law, Congress enacted the amendatory statute (approved April 5th, 1910), providing that "any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such omployee, but in such cases there shall be only one recovery for the same injury."

The statute as thus amended forbids the prosecution of more than one action and permits only one recovery; but the action is prosecuted, after the death of the injured person, for the benefit of the widow and next of kin, and may include compensation for the pain and suffering endured by the injured person as well as for pecuniary loss of earnings and contributions; in other words, compensation for all of the damages resulting from the injury for which the statute provides a remedy inures after the death of the injured person to the benefit of the widow and next of kin, but must be recovered in one action. In the present case no action had been instituted by the injured employee, and plaintiff prosecuted only one cause of action and seeks only one recovery for the various elements of damages for which the statute authorizes a recovery of compensation. There was, therefore, nothing to call for an election between different causes of action.

The defectively equipped car which is alleged to have
198 caused the injury was loaded with coal at Huntington, Arkansas, and was consigned over defendant's line to some point in the State of Texas. After it had been loaded and started on its journey over defendant's line through the State of Oklahoma, it was found to be in a damaged condition. The draw-bar and coupling on one end were broken off so that there were no means of coupling the car at all, and the draft timbers and headblock were gone. The car was not in condition for use, and the employees in charge of the train caused it to be carried for repairs to Ft. Smith in another train, a distance of 14 miles, off the route of the car's journey to its destination. It needed what is termed "heavy" repairs, and the evidence tends to show that such repairs could not be made at the place where the disabled condition of the car was discovered, and that Ft. Smith was the nearest place where such repairs could be conveniently made. When the car reached the yards at Ft. Smith it was placed on the track used for storing disabled cars when the *reapir* track was full but which was used for commercial purposes when not in use as a storage track. There were three tracks upon which cars were repaired, but they were full at the time. The car remained loaded at the time deceased was injured so as to be ready to resume its original journey when repaired. Afterwards it became necessary, in order to get the car over to the repair track, to move it, together with 12 or 14 others, from the storage track, where it was standing, and carried a distance of about three-fourths of a mile, and set in on the main track, where it was to remain while other cars were being switched. This was at night. There was a rule of the company that "second and third class trains must move within the yard limits prepared to stop unless the main
199 track is seen or known to be clear." Deceased was a switchman engaged in making up trains of cars for interstate shipment. His post of duty while the switch-engine was moving was on the foot-board in front of the engine on the right-hand side of the draw-bar, so as to be ready to couple the engine to cars. His engine was going northward on the main track for the purpose of doing some switching in making up cars for a through freight train. He and two of the switchmen were standing on the front foot-board, as usual, when the engine collided with the disabled coal car hereinbefore mentioned. The other two men stepped off the foot-board after they discovered the car in front, but deceased remained in his position on the foot-board, and the car, on account of the missing draw-bar, coupling and draw-head, came in contact with the engine and crushed him. The testimony shows that if the coupling had been in good order the impact would have coupled the car and engine together, or would have bumped the car off, in either event obviating any injury to deceased. The engine was moving at a low rate of speed and, according to testimony adduced, the glare of the headlight on another engine facing them prevented the men on the switch-engine from discovering this car earlier. Deceased discovered the car first and called out, "There is a car," whereupon a signal was given to the

engineer, who at once began stopping the engine but too late to prevent the collision. Deceased lived several days and, according to the testimony, suffered great pain.

Our conclusion is, that the jury were warranted in finding that when the injury occurred the car was still in use for purposes of interstate commerce within the meaning of the Safety Appliance Act. The statute, as interpreted by the Supreme Court of
200 the United States, imposes upon the carrier the absolute duty to provide and keep proper couplers at all time and under all circumstances on cars while used in interstate commerce, and the carrier cannot escape liability by showing that it exercised reasonable care in equipping its cars with the required safety appliances and used due diligence to keep them in repair. St. Louis, Iron Mountain & Southern Ry. Co. vs. Taylorm 210 U. S. 281; C. B. & Q. Ry. Co. v. United States, 220 U. S. 559; Delk vs. St. Louis & San Francisco Rd. Co. 220 U. S. 580.

The fact that this car had been taken to Ft. Smith for heavy repairs before it could continue its journey did not suspend its use as an interstate commerce car at the time it was being switched about the tracks in the yards where employees engaged in handling trains would come in contact with it. When the company ordered that the car be removed from the storage track to other tracks for any purpose, it incurred the absolute duty, while the car was being moved, to see that it was properly equipped in accordance with the statute, and is liable for damages sustained by its lack of proper equipment. The statute has been amended so as to exclude the criminal penalty while the car is being "hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired," but the amendatory statute expressly provides that "such movement of hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with
201 equipment which is defective or insecure."

It is also contended that the defective condition of the car was not the proximate cause of the injury, because deceased was not attempting to use the coupler or to couple on to or handle that car. The argument is, that the injury resulted from the collision, which was in no way attributable to the absence of a properly equipped coupler. It is true the Supreme Court of the United States said, in the case of Johnson vs. Southern Pacific Co. 196 U. S. 1, "the risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically." But the Act makes it unlawful for a common carrier "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers automatically coupling by impact," and liability necessarily follows for an injury to an employee by reason of failure of the carrier to comply with the statute.

The evidence establishes the fact that the injury to deceased would not have occurred but for the absence of proper equipment. That was the direct cause of the injury, notwithstanding the collision. Choctaw, Oklahoma & Gulf Rd. Co. vs. Holloway, 191 U. S. 334.

The only remaining question necessary to mention is the assignment of error as to the ruling of the court in permitting the plaintiff, who was the wife of deceased and administratrix of his estate, to testify as to the amount of contributions made by him to her at various times. It is insisted that her testimony fell within the constitutional provision that "in actions by or against executors, administrators or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify
202 against the other as to any transactions with or statements of the testate, intestate or ward, unless called to testify thereto by the opposite party." Sec. 2 of Schedule to Constitution of 1874.

This question is decided adversely to defendant's contention in the case of St. Louis and San Francisco Rd. Co. vs. Fithian, ante, p. —, the decision being based upon the view that the administrator in this class of cases acts merely as a trustee and that it is not such an action as falls within the above-quoted provision. The writer is satisfied with the conclusion reached on that question, but does not feel sure that the grounds for the decision are sound, inasmuch as a judgment for costs may be rendered against the estate. Bush v. Prescott & N. W. Ry. Co. 83 Ark. 210. He feels more secure in the conclusion that the testimony does not fall within the constitutional inhibition, for the reason that it establishes facts entirely collateral to the main issue, i. e., the liability of the defendant and merely goes to the question of amount. The provision in question was aimed at an exclusion of the testimony of one party as to the transaction which constituted the basis of the cause of action and not merely to transactions which are purely collateral to the main issue. This view is sustained by the decision of the Supreme Court of the United States in United States v. Clark, 96 U. S. 37, and is undoubtedly sound. There the question arose whether a claimant against the Government should be permitted to testify concerning the amount of money contained in a lost package for which the Government was liable, there being a statute of the United States which prohibited a claimant against the Government from
203 testifying, The court said:

"We are of the opinion that, by the rules of evidence derived from the common law, as it is understood in the United States, whenever it becomes important to ascertain the contents of a box, trunk or package which has been lost or destroyed, under circumstances that make some one liable in a court of justice for the loss, and the loss and the liability are established by other testimony, the owner or party interested in the loss, though he may be a party to the suit, is a competent witness to prove the contents so lost or destroyed. 1 Greenl. Evid. Secs. 348-350, and notes. "This is one of those exceptions to the rigorous rule of the common law excluding parties and persons having an interest in the result of the

suit from becoming witnesses in their own behalf, which has been engrafted upon that system. It is founded in the necessity of permitting the only party who knows the matter to be provded to testify, in order to prevent an absolute failure of justice, where his right to relief has been established by other evidence. We are aware that there is a conflict of authority on this point, but we believe the preponderance is in favor of the proposition we have stated; and looking at it as a matter of principle, in the light of the progress of legislation and judicial decision, in the direction of more liberal rules of evidence, we have no hesitation in adopting it, in the absence of legislation by Congress on the subject."

In the present case, and in cases of like character, the liability of the defendant for whatever injury has been sustained is established by other testimony, and, as before stated, the question of the amount of contributions is collateral to the main issue, and tends only
204 to establish the amount of the liability. For that reason it does not encroach upon the provision against allowing parties to a transaction with a decedent to testify, the evident meaning of the word "transaction" being that which constitutes the asserted cause of action.

No error is found in the present record, and the judgment of the circuit court is affirmed.

205 *Clerk's Certificate.*

SUPREME COURT,
State of Arkansas, ss:

I, P. D. English, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of St. Louis & San Francisco Railroad Company, Appellant, vs. Fanny M. Conarty, Administratrix of the estate of W. G. Conarty, deceased, Appellee, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this 24th day of April, 1913.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas.

206 *Assignment of Errors.*

In the Supreme Court of the State of Arkansas.

FANNY M. CONARTY, Administratrix of the Estate of W. G. Conarty, Deceased, Plaintiff,

vs.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Now comes the above named defendant and files herewith its petition for writ of error and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment of errors:

I.

The Supreme Court of Arkansas erred in holding and deciding that under the Employers' Liability Act as amended on April 5, 1910, that the defendant, a citizen of the state of Missouri, being a corporation organized under the laws of the state of Missouri and the plaintiff Fanny M. Conarty, and the deceased W. G. Conarty being residents and citizens of the state of Arkansas, said cause was not removable to the United States District Court from the state court in which said action was brought. The validity of said Employer's Liability Act denied to the defendant the right to transfer said cause to the federal court and the validity of said act was denied and drawn in question by the defendant on the ground that said act was repugnant to the constitution of the United States and in contravention thereof and is contrary to Article Two, Section One, Act Three of the Constitution of the United States which says "The judicial power shall extend to all cases in law or in
207 equity * * * between citizens of different states."

II.

The Supreme Court of Arkansas erred in holding and deciding that the car in question, which is alleged to have had a defective coupler (the cause of action being based upon an act of Congress known as "The Safety Appliance Act," and amendments thereto and the Employer's Liability Act as amended on April 5, 1910) was engaged in Interstate Commerce at the time of the alleged injury received by W. G. Conarty, deceased, said fact being denied and drawn in question by the defendant in this cause.

III.

Said Court erred in holding and deciding that the defective condition of the coupler of said car was the proximate cause of the injury to deceased, W. G. Conarty, which fact was denied and drawn in question by the defendant and plaintiff's recovery was sustained upon said holding.

IV.

Said court erred in holding and deciding that the act of W. G. Conarty in remaining upon the footboard of the switch engine when he knew that the engine was going to collide with a standing freight car on the main line which he did not contemplate coupling to, and when no duty required him to remain there, was not negligence and was not the proximate cause of the injury.

V.

Said Supreme Court erred in holding that Fanny M. Conarty was a competent witness to testify as to transactions with deceased, the amount of contributions made by him to her at various times, she being administratrix and incompetent to testify to such
208 facts under the constitution of the State of Arkansas and the laws of the United States and her competency being denied and drawn in question by the defendant.

VI.

Said Supreme Court erred in deciding and holding that Lee Armstrong, W. J. Daniels and F. T. Wollum could testify, and allowing said witnesses to testify as to the effect of a collision of a car standing on the main track if the automatic coupler had been in perfect condition and what effect it would have on a brakeman standing on the footboard if such collision would occur, said testimony being objected to and the right to introduce the same being denied and drawn in question.

VII.

Said Supreme Court erred in holding and deciding that the plaintiff was not required to elect, under the laws of the United States, to-wit; the Employer's Liability Act as amended on April 5, 1910, whether or not she would prosecute her cause of action as administratrix for compensation for the next of kin or whether or not she would prosecute her cause of action for the pain and suffering endured by W. G. Conarty on account of the alleged injury, said motion being made, insisted upon and denied both by the trial court and the said Supreme Court.

VIII.

Said Supreme Court erred in holdng and deciding that the facts proven in said cause constituted a cause of action against the defendant under the acts of Congress on which said action was based.

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IX.

Said Supreme Court erred in holding and deciding that Congress had authority to legislate over a car in the condition of the one in question while being repaired and while not engaged in interstate commerce and in holding that said Act under which said

cause of action was prosecuted was valid as to the facts and circumstances shown in evidence.

X.

The trial court erred in refusing the peremptory instruction asked by the defendant, and the Supreme Court of Arkansas erred in sustaining such ruling.

For which errors the defendant, the St. Louis & San Francisco Railroad Company prays that the said judgment of the Supreme Court of the State of Arkansas dated the 3 day of February 1913 be reversed and a judgment be entered in favor of the defendant and for costs.

W. F. EVANS,
B. R. DAVIDSON
Attorney- for Defendant.

Filed April 23, 1913.
P. D. ENGLISH, *Clerk.*

210 In the Supreme Court of the State of Arkansas.

FANNY M. CONARTY, Administratrix of the Estate of W. G. Conarty, Deceased, Plaintiff,

vs.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court of the State of Arkansas in rendering judgment against it in the above entitled case, the defendant hereby prays a writ of error from the said decision and judgment to the United States Supreme Court and an order fixing the amount of a supersedeas bond. Assignment of errors herewith.

W. F. EVANS &
B. R. DAVIDSON,
Attorneys for the Defendant, St. Louis & San Francisco Railroad Company.

STATE OF ARKANSAS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the St. Louis & San Francisco Railroad Company to Fanny M. Conarty, administratrix of the estate of W. G. Conarty, deceased in the sum of $15000.00/100 said bond when approved to act as a supersedeas. This 22 day of April 1913.

E. A. McCULLOCH,
Chief Justice, Supreme Court of the State of Arkansas.

Filed April 23, 1913.
P. D. ENGLISH, *Clerk.*

211 In the Supreme Court of Arkansas.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,

vs.

FANNY M. CONARTY, Administratrix of the Estate of W. G. Conarty, Deceased, Defendant in Error.

Bond.

Know all men by these presents; That we, the St. Louis & San Francisco Railroad Company as principal and the Equitable Surety Company as surety are held and firmly bound unto Fanny M. Conarty as administratrix of the estate of W. G. Conarty, deceased in the sum of $15,000.00 to be paid to the said Fanny M. Conarty as such administratrix to which payment well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents sealed with our seals and dated this 22nd day of April, 1913.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged if it shall fail to make good this plea, then this obligation
212 to be void, otherwise to remain in full force and effect.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
By W. F. EVANS &
B. R. DAVIDSON,
Attorneys.

EQUITABLE SURETY COMPANY,
By J. W. HOUSE, *Resident Vice Prest.*,
[SEAL.] IDA B. DAVIS, *Resident Ass't Sec'y.*

Bond approved and to operate as a supersedeas this 23rd day of April, 1913.

E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed April 23, 1913.

P. D. ENGLISH, *Clerk.*

213 *Writ of Error.*

UNITED STATES OF AMERICA *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Fanny M. Conarty, administratrix of the estate of W. F. Conarty, deceased, and the St. Louis & San Francisco Railroad Company, a corporation, wherein was drawn in question the construction of the Employers' Liability Act, a statute of the United States, as amended on April 5, 1910, and the decision was against the right and privilege and exemption specially set up and claimed by the said St. Louis & San Francisco Railroad Company, corporation, and also was drawn in question the construction of an Act of Congress called "The Safety Appliance Act, and amendments thereto, and the decision was against the right, privilege and exemption specially set up and claimed by said corporation, and wherein was drawn in question the authority of Congress to legislate over a car in the condition of the one in question, while being repaired and while not engaged in interstate commerce, and in which the validity of the Act of Congress was drawn in question, and the construction thereof was against said corporation, and its right, privilege and exemption as specially set up and claimed; and manifest error hath happened to the great damage of the said St. Louis & San Francisco
214 Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the twenty-third day of April, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the District Court, East. Dist. Ark., Western Division, U. S. A.]

SID B. REDDING,
Clerk District Court of the United States
for the Eastern District of Arkansas,
Little Rock Division.
By W. P. FEILD, JR., *D. C.*

Allowed, April 23, 1913,
E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Filed April 23, 1913.
P. D. ENGLISH, *Clerk.*

215 *Certificate of Lodgement.*

SUPREME COURT, STATE OF ARKANSAS, *ss:*

I, P. D. English, clerk of the said court, do hereby certify that there was lodged with me as such clerk on April 23, 1913, in the matter of the St. Louis & San Francisco Railroad Company, a corporation, versus Fanny M. Conarty, Administratrix of the estate of W. G. Conarty, deceased,

1. The original bond of which a copy is herein set forth.
2. Copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this April 24, 1913.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas.

216 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Fanny M. Conarty, administratrix of the estate of W. G. Conarty, deceased, greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Arkansas, wherein the St. Louis & San Francisco Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Arkansas, this 23rd day of April, 1913.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Attest:
P. D. ENGLISH,
Cerk, Supreme Court of Arkansas.

LITTLE ROCK, ARKANSAS, *April* 23, 1913.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above
217 citation, and enter an appearance in the Supreme Court of the United States.

SAMUEL R. CHEW,
Attorney for Fanny M. Conarty,
Administratrix of the Estate of
W. G. Conarty, Deceased.

218 *Return to Writ of Error.*

UNITED STATES OF AMERICA,
Supreme Court of Arkansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this April 24, 1913.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas.

Costs of Suit.

Costs in Circuit Court	$101.75
Costs in Supreme Court	81.00
Making Transcript for the Supreme Court of the United States, Certificates, Seals, etc	65.00

Paid by plaintiff in error.

P. D. ENGLISH, *Clerk.*

Endorsed on cover: File No. 23,673. Arkansas Supreme Court. Term No. 166. St. Louis & San Francisco Railroad Company, plaintiff in error, vs. Fannie M. Conarty, administratrix of the estate of W. F. Conarty, deceased. Filed May 5th, 1913. File No. 23,673.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Plaintiff in Error,
vs. (23,673.)
FANNIE M. CONARTY, Administratrix of the Estate of W. F. CONARTY, Deceased,
Defendant in Error.

No. 166.

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

STATEMENT OF CASE, ABSTRACT OF RECORD, ASSIGNMENT AND SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

Plaintiff, Fannie M. Conarty, her husband, W. G. Conarty, and their three minor children, aged, respectively four (4), seven (7) and ten (10) years, were

on the 13th day of November, 1910, residents and citizens of Fort Smith, in the State of Arkansas.

Plaintiff in error on said date was, and since said date has been, a non-resident railroad corporation, having been chartered under the laws of Missouri, with its principal place of business located in the City of St. Louis, Missouri (P. R., pp. 2, 8, 50).

Plaintiff was appointed by the Probate Court at Fort Smith, Arkansas, administratrix of her husband's estate. The latter was injured while in the service of the above railroad company on the morning of November 13th, 1910, and died intestate on the 19th day of said month. The present action was brought by the plaintiff, as administratrix aforesaid, in the Circuit Court of Crawford County, in the State of Arkansas, against the above railroad company to recover one hundred thousand dollars as damages, on account of injuries sustained by her said husband which resulted in his death, while acting as a switchman in the yards of said Railroad Company, at Fort Smith, Arkansas, where bad order cars were handled and placed upon the proper track for repair.

In the complaint, plaintiff sought to recover damages for the **pain and suffering endured by the deceased** up to the time of his death (P. R., pp. 3 and 4), and **likewise** for the **pecuniary loss sustained by reason of his death** (P. R., pp. 1 to 4). **Both** elements of damage were submitted to the jury in fixing the amount of recovery (P. R., p. 92).

It is averred in the complaint, that on the morning of November 13, 1910, said decedent was in the discharge of his duty as a switchman in the yards of said Railroad Company at Fort Smith, and while at his work upon the foot-board of one of the Railroad Company's

locomotives then being used for distributing and switching cars in said yard, loaded with freight and merchandise which were being transported from Arkansas to Texas, he was, through the negligence of the said Railroad Company, caught between the front end of said locomotive and the end of a certain coal car, loaded with coal and bound for the State of Texas, which produced the injuries complained of, and which ultimately resulted in his death (P. R., p. 3). It is then charged that said Railroad Company in handling said coal car with a draw-bar gone and without a coupler, violated the laws of Congress (Employers' Liability Acts, and the Safety Appliance Acts), and hence a recovery was sought on account of the alleged violation of the Federal laws, as aforesaid, etc. (P. R., p. 4).

The Railroad Company, after being served with process, on June 17, 1912, filed in the Circuit Court of Crawford County, Arkansas, its petition and bond for removal to the Circuit Court of the United States in and for the Western District of Arkansas, Fort Smith Division. Said removal was asked by reason of the diverse citizenship of the plaintiff and defendant herein. It appeared that plaintiff and her said children were residents and citizens of Arkansas, while said Railroad Company was a non-resident of said state and chartered under the laws of Missouri (P. R., pp. 2 and 8).

The bond for removal accompanied the petition and was in proper form (P. R., p. 9).

Said petition for removal was overruled and exceptions duly saved to overruling of same (P. R., p. 9). The trial court construed Section 6 of the Employers' Liability Act as amended in 1910 (36 U. S. Stats., at 1 ch. 143, p. 291), as prohibiting the removal of said

cause. The answer contains a specific denial of all the allegations of the complaint, except that it does not controvert the allegation that said Railroad Company was chartered under the laws of Missouri (P. R., pp. 2, 5, 6 and 7).

The answer likewise pleads assumption of risk and contributory negligence upon the part of deceased (P. R., p. 7).

The evidence and instructions given and refused will be referred to hereafter, with the ruling of the Court thereon.

Motion to Compel Plaintiff to Elect.

After all the testimony was in the defendant company filed a motion in words and figures following:

> "The defendant, not waiving its right under its demurrer, and protesting against being required to answer further, moves the Court to require the plaintiff to elect whether or not she will prosecute her cause of action as administratrix for compensation for the next of kin or whether or not she will prosecute the cause of action for the pain and suffering endured by W. G. Conarty on account of the injuries alleged" (P. R., p. 88).

This motion was overruled and an exception to such ruling duly saved.

Verdict and Judgment.

The jury returned the following verdict:

> "We, the jury, find for the plaintiff and assess the damages at ten thousand dollars ($10,000)."

Judgment was entered upon this verdict in due form (P. R., pp. 10-94).

Motion for New Trial.

The defendant company filed its motion for a new trial in due time, and which will be referred to hereafter (P. R., pp. 10-94, 95 and 96).

Said motion for new trial was overruled, an exception taken, and the cause appealed to the Supreme Court of Arkansas, it being the highest court of last resort in said State (P. R., 10-96).

On June 28, 1912, the defendant company was given ninety days from said date in which to file its bill of exceptions (P. R., p. 10). Said bill of exceptions was filed August 24, 1912, within the time authorized (P. R., p. 96).

Transcript of Appeal.

A transcript was duly filed in the Supreme Court of Arkansas; the cause duly heard and considered by said Court; and on February 3rd, 1913, the judgment of the trial court was affirmed, and judgment of affirmance duly entered by said Supreme Court (P. R., p. 98).

Opinion of Arkansas Supreme Court.

The above opinion will be found in full upon pages 100 and following of Printed Record (see also 155 S. W. 93).

Petition for Rehearing.

A petition for rehearing was filed in the Arkansas Supreme Court on March 3rd, 1913, and will be found printed in full upon pages 98 and following of the printed record. Said petition for rehearing was overruled on March 10, 1913 (P. R., p. 100).

Application for Writ of Error.

On April 23, 1913, said defendant company presented to Hon. E. A. McCulloch, Chief Justice, Supreme Court of Arkansas, its assignment of errors (P. R., pp. 106, 107 and 108); its petition for writ of error (P. R., p. 108) and its *supersedeas* bond (P. R., p. 109).

Writ of Error—Citation, Etc.

A writ of error in due form was issued by Chief Justice McCulloch. Citation was also issued, and service waived on the latter April 23, 1913 (P. R., pp. 110, 111 and 112).

Return to Writ of Error.

On April 24, 1913, a transcript of the proceedings aforesaid was transmitted to this Court, and a copy of the same will be found in the printed record.

ABSTRACT OF RECORD AND BRIEF FOR PLAINTIFF IN ERROR.

Complaint.

The plaintiff, Fannie M. Conarty, as administratrix of the estate of W. G. Conarty, deceased, alleges that W. G. Conarty departed this life in the City of Fort Smith, Arkansas, his place of residence, on the 19th of November, 1910, leaving surviving him his widow, Fannie M. Conarty; Virginia Conarty, a daughter; Jack Conarty, a son, and Elmore Conarty, a son; that plaintiff was appointed administratrix; that the St. Louis & San Francisco Railroad Company is now and was on the days and dates hereinafter mentioned a corporation organized and existing under the laws of the

State of Missouri, operating a road through Texas, Oklahoma, Arkansas and Missouri; that it owned and had under its control a number of freight cars and locomotives and was engaged in the business of moving and transporting freight and merchandise through said states; that it was the owner, operator and manager of a system of railroad tracks and side tracks in the City of Fort Smith, Arkansas, over which it caused cars loaded with merchandise to be congregated, distributed and constructed into trains to be moved out of said state; that deceased W. G. Conarty was in the employ of defendant as a switchman or brakeman in said yards and that it was his duty to assist in moving and switching cars loaded with merchandise, and while so engaged on the 13th of November, 1910, and on duty on the footboard of one of defendant's locomotives for the purpose of switching and handling cars loaded with freight destined to points outside of said state, and while said locomotive was being moved for the purpose of distributing said cars, he was,

> "by and through the carelessness, negligence, wongful and unlawful management and conduct of the defendant, as hereinafter set forth and complained of, caused to be caught between the front end of said locomotive and an end of a certain coal car; said coal car being then and there loaded with freight, merchandise or coal destined from some point on defendant's said line of railroad in the State of Arkansas to some point in the State of Texas."

Which injuries caused him physical pain and suffering and were the cause of his death.

Prays damages for $100,000 for pain and suffering of deceased:

"Plaintiff says that said negligence, carelessness, wrongful management and unlawful conduct of the defendant consisted in this, to-wit: That it negligently, wrongfully, carelessly and in violation of the laws and acts of the Congress of the United States, allowed and permitted said coal car so loaded with coal as aforesaid to be hauled and used on its said main line and side tracks in said yards in said City of Fort Smith, and allowed and permitted said coal car so loaded with coal as aforesaid to be hauled, and used, placed, switched and moved upon its said main line track and said side tracks in said yards in said City of Fort Smith, while and when said coal car so loaded with coal as aforesaid was not then and there equipped with a coupler that would couple onto or with said locomotive or onto and with another car automatically by impact; that said end of said coal car was without a coupler or drawbar of any kind; that the draft timbers in said end of said car were broken down and torn out so that the coupler and drawbar that would couple automatically by impace with said locomotive or another car could not and was not kept and maintained in said car as the said act of Congress directs."

And plaintiff says that by reason of said negligence, carelessness, wrongful management and unlawful conduct of said defendant as aforesaid, and while said coal car was so upon said main line track, the said locomotive upon which her said intestate was then and there so upon as aforesaid ran into and collided with said defective end of said coal car, thereby causing her said intestate to be caught between the said end of the said coal car and said locomotive and injured as aforesaid. Prays damages for $100,000 for next of kin (P. R., pp. 1-4).

ANSWER.

The answer, first, did not deny the citizenship of the plaintiff and defendant, but denied every other allegation of the complaint and stated as follows: "Defendant denies that said car was engaged in interstate commerce at said time or that the locomotive on which it is alleged plaintiff was riding was engaged in interstate commerce at said time, and denies that the alleged want of a coupler had anything whatever to do with the alleged injury to deceased.

Second. Defendant, further answering, says that deceased was entirely familiar with the manner in which business was done and conducted in the yards in the City of Fort Smith and with the manner in which it was being done and conducted at the time of his alleged injury; that the business was being done and conducted in the usual and ordinary manner and that by remaining in the service without objection or complaint, he assumed the risk of injury therefrom.

Third. Defendant, further answering, says that any injuries received by the said W. G. Conarty were caused and contributed to by his own carelessness and negligence (P. R., pp. 5-7).

A petition in proper form to transfer this cause to the Federal Court, alleging that the matter and amount in dispute exceeds exclusive of costs, three thousand dollars; that defendant was a corporation and a citizen of the State of Missouri; that its principal place of business was in the City of St. Louis in said state; that plaintiff and her children and those of deceased were citizens and residents of the State of Arkansas, was filed on June 17th (P. R., p. 8).

A bond in due form was also filed and approved on said date (P. R., p. 9).

The defendant moved the Court to transfer said cause to the Federal Court upon said petition and bond based upon diverse citizenship as aforesaid, but the Court overruled said motion and refused to order said cause transferred, to which defendant excepted (P. R., p. 9).

A jury trial was had and a verdict for $10,000 was returned and judgment was rendered for said amount. A motion for new trial was filed, and overruled and defendant excepted (P. R., p. 10).

PLAINTIFF'S EVIDENCE.

S. P. Haas testified: I am division freight agent for the Frisco; have a record showing movement of the car on the 9th of November, 1910, car N. O. & N. E. No. 13239; the record shows it was loaded with coal when it came into Fort Smith; it was listed from Jenson, Arkansas; the notation shows the car "B. O.," which means "bad order". The record shows the car left Fort Smith on November 19th, destined to Paris, Texas, over the Frisco; the Frisco handles freight out of Missouri into the State of Arkansas, into Oklahoma and Texas in box cars and coal cars (P. R., pp. 11-12).

Cross-Examination.

The car arrived at 1:35 a. m. from Jenson; when it departed it went back over the same line from which it had been received to Jenson; the distance from Fort Smith to Jenson is about 14 miles; it was brought in from Jenson as a bad order car to Fort Smith and when it left it was not marked bad order. It was loaded with coal the same as when it came in (P. R., p. 13).

Redirect Examination.

There are a number of coal mines on the branch that runs into Jenson; the points are Huntington, etc. They ship coal through Jenson to Texas; this car was originally billed from Huntington to some point in Texas (P. R., pp. 13-14).

Recross-Examination.

There is no reason for a car originating at Huntington destined to Paris, Texas, to come to Fort Smith if there was nothing the matter with the car; it would leave Huntington and go to Jenson and from there on to destination in the State of Texas (P. R., p. 14).

Redirect Examination.

I mean if the car was in good shape it would not come through Fort Smith, but if in bad shape, if they could repair it at Jenson they would, but if they could not, they would bring it to Fort Smith. Think they make light repairs at Jenson (P. R., p. 14).

Lee Armstrong testified: I was night yard master for the Frisco in Fort Smith in November, 1910. When I speak of the Frisco, I mean the St. Louis & San Francisco Railroad Company. I knew W. G. Conarty; he worked under my supervision in November, 1910. We were working in the yards on the night of the 13th and morning of the 14th of November, 1910; the yards, altogether, are three miles long, running east and west; the east yard is the yard north of "J" street, the west yard, west of "J" street; there were two crews, three switchmen and an engineer and fireman to each crew, and two engines. Their duties lots of times brought them in the same part of the yard at the same time;

don't know how long Mr. Conarty had been working there; was there when I came in November, 1908. I know where the Arkansas Cotton Oil Mill is; there is a side track or switch track between the main track that leads off from the Cotton Seed Oil Mill; there were some cars on that track, would say about ten or twelve. I saw a car branded N. O. & N. E. No. 13239 that night; when I saw it, the outside engine had the car, coming up the main track with it; this engine was in charge of foreman Hethrington, engine 2670; what we call the outside engine is the engine that does the outside work, the car was about four blocks from where Conarty got hurt when I saw it; it was in a cut of twelve or fourteen cars that Hetherington had hold of; it passed me about "H" and "I" streets; Conarty was hurt at "E" and "F"; it was fifteen or twenty minutes before he was hurt that I saw it; some of this cut of cars were loaded, some empty. Mr. Hetherington had hold of this string of cars with the intention of putting them on the rip (repair) track; they were all bad orders; the freight in these cars was destined both ways, east and west; some outside and some inside of the state. Hetherington worked under my instructions; the way he got hold of this string of cars, I instructed him to fill the rip track; this car on the 10th of November was on track No. 2 which is the same track that he got it off of the night Mr. Conarty was hurt; it was mixed up with other cars; it was defective in the west end, the drawbar was gone, the draft timbers were, in a manner, gone; they were damaged; when I speak of the drawbar I mean the coupler; when in good fix, the coupler will couple automatically; the Frisco had a rule or custom requiring a card of some kind being put on a car when it was in a defective condition; it is a form made

for that purpose with "bad order" written across the top. I would say there were at least four or five or probably six loads in the cut of cars destined for points outside of the state; the next time I saw this car was after Conarty was hurt; it was standing just east of "F" street on the main track; there was nothing else attached to the car; I have been railroading about twenty years; engaged in switching 14 or 15 years; have been handling these couplers ever since they have been in use. An engine and coal car with couplers coming together at the rate of five miles an hour would couple; the space between the footboard of the engine and the ends of the car when they are coupled is about two feet, I suppose, room for a man in there. A switchman standing on the footboard, if the engine should run into a car and find the coupler intact and in good order, at the rate of five miles an hour, they would couple; would have space in there to protect himself; that is often done in my experience. Mr. Conarty was a switchman whose post of duty was next to the drawhead on the right-hand side of the footboard; that is the post of duty for the man following the engine, to couple and uncouple the engine from the cars; he can stand there and lift the couplers and make the coupling, with a lift pin; that is the reason he was put there. After Conarty was injured, I found blood on the cylinder head and steam chest which is just above the cylinder head. There were a few bolts, five-eighths bolts, I would say, protruding from the end of the car where the timber had been torn off, sticking out, I would say an inch or so, some of them might have been longer than others. Ordinarily in the yards, an engine moving about one mile an hour, would couple

at that speed and if going five miles an hour it would still couple.

Over objection of defendant, the following testimony was admitted:

> Q. Suppose there had been a draw-bar in the end, based on your experience, and it come together four or five or six or seven miles an hour, although the coupling apparatus was so it would not couple automatically and there was a coal car on the main line, what effect would it have on the car?
>
> A. If the knuckles were both closed, the car would rebound.
>
> Q. You mean by that the car would move on the rails, move away from the end of the engine?
>
> A. Yes, sir.
>
> Q. And leave space in between the end of the engine and the end of the car and footboard so that a man would be safe on the footboard?
>
> A. Yes, sir.

To the admission of which defendant excepted (P. R., pp. 15-23).

Cross-Examination.

We had three repair tracks at the time; when the repair tracks were full we stored the bad-order cars in the east end of the yards; used the east end of the yards for that purpose; we drew the cars from the repair track after they had been repaired at any time between 7 and 12 p. m. We took that time because the men worked all day and the cars are not turned over to us until 6 p. m.

We have no business in the repair tracks until after 6 p. m.; these were all bad-order cars; they were standing on the track where we stored that kind of bad-

order cars awaiting repairs; we had three tracks on which repairs were being done and they were full of bad-order cars that were being repaired when this was brought in. In removing bad-order cars it was necessary to move them in the manner I have stated in order to transfer them to the repair tracks. The west end of this car being out of commission, no drawbar or draft timber in it, it was stored with the other bad-order cars until such time as it would admit those cars being put into the rip by others being repaired. As near as I can remember there were about fifteen or eighteen cars O. K.'d on the rip tracks that night; the engine went down to get these twelve or fourteen cars to bring up and put in the place of those that had been O. K.'d, that is, that had been repaired during the day. The west end of this car being out of commission, it was set out first, and then the others picked up and coupled to the good drawbar, shoved up the main line and left in order that it could be handled separately, by itself, and it was put into the end of the rip track by running around the entire cut, that is the only way it could have been handled; if you had gone to the west end where this bad-order car was it could not have been handled; we took the cars with the good drawheads in and put them in the rip track first and we were in the act of going back after this one without the drawhead when the other engine came down the main track and struck it; we were about five blocks from the car that we intended to get when the engine Mr. Conarty was riding on struck the car; Mr. Conarty and his crew had been working what we called the lead engine; they make and break trains; they had been working in the same end of the yard that this engine was working in; they had occasion to go to the west end of the yard;

they worked there frequently together; they cannot both use the main line at the same time; one engine has a duty to perform and the other one has business in the other end of the yards to keep out of its way; that particular engine was detailed to work at that place at that time; the other crew knew it was customary for them to use the main line when they were working the rip track; they had to in order to work the rip track; the engine was going down to get this car for the purpose of taking it to the rip track at the time of the accident; was five blocks away going in that direction; the other crew did not have anything to do with handling this car; they were not required to couple onto it or handle it in any way; it was not in the course of their work to do that (P. R., pp. 23-25).

Redirect Examination.

It would be about three or four hundred yards from where the accident occurred to the entrance of the repair tracks, I guess. The car would have to go in about two hundred and fifty feet on the rip track; four hundred yards and two hundred and fifty yards would make 650 yards; it would be eight hundred and fifty yards from the point of collision to where the car would have been cleared on the repair track; the car had been moved about three-quarters of a mile down the main line before the collision took place and had passed the mouth of the rip track about four hundred yards; it was necessary because it was 12 cars next to the engine; the engine was on the east end of the cut, this car was on the west end of the cut, it was the extreme west car of the cut we were handling; the east end of this car was coupled to the west end of the cut of

cars; the defective end was the one which Conarty came into that caused his death; when we got this car there we uncoupled it and put the other cars in the repair track, we had to back up the main line in order to let a freight train out that had just headed into this switch, a freight train had come from the east and we shoved up the main line in order to let their engine out, because they had to use the same line to go to the roundhouse. Mr. Conarty and his crew had to go to about a quarter of a mile to do their work in the west yards; it was not over a hundred and fifty yards from where the point of collision was to where he was working; they had cleared the tracks in the east yards; there was one clear track in the west yards we had to block in order to make up the merchandise train 35 which was an interstate train bound for Texas. Mr. Conarty was handling good cars in the west end.

Q. I will ask you to state on the track from which you got this defective car that was loaded with coal, were there any cars on there except cars that had been marked bad order?

A. Well, I don't think so.

Q. What is your best recollection?

A. My best recollection that track was entirely full of bad-order cars.

Q. Was that track used at any time for any other purpose?

A. Yes, sir; at times; when we didn't have it used for that purpose; that we didn't have a surplus of bad-order cars it would have been used for storage or for any other commodity we might have had there.

Q. That was a track that was used interchangeably?

A. If we had an accumulation of bad orders we

would have to give up the track at times to accommodate these bad orders, we cannot get into the repair track; that track was used for that purpose at that time (P. R., pp. 25-29).

Recross-Examination.

We kept the bad-order cars separate, and when our tracks were full we used this as a storage track; did not mingle these with the other cars, kept them separately; used that for that purpose when we had a surplus of bad order cars. In pulling the storage track we did not go any further east than was necessary to clear and bring the cars out and went far enough west so as to be able to clear the track before we pulled the others down; we were doing that in the usual and ordinary way of switching in that yard and have been doing that way as long as I have been there; we could not have handled the bad-order car in any other way; there was no other way to handle it (P. R., p. 29).

W. J. Daniels testified: I am a switchman; was employed as such in November, 1910, in the yards of the Frisco in Fort Smith; went to work there in July, 1910; have had eleven years' experience as a switchman; knew Conarty; worked with him in the yards from July to November; was a member of the night crew with Mr. Conarty and S. A. Douglas; Conarty was at his post of duty on the footboard next to the drawbar; my post of duty is on the left side of the footboard; his on the right. Mr. Douglas was engine foreman; his post of duty was on the footboard at the right side. We had been up to shift some freight cars in the city track; we came out of the city track and came down the

main line; the engine we were handling handled interstate commerce in making and breaking up trains. We had started back for the purpose of making up freight train No. 735, which runs between St. Louis, Mo., and Paris, Texas, which had come in that night. We were moving north toward Van Buren and we collided with a loaded coal car standing on the main line; just before the collision Mr. Conarty says, "There is a car." We had a headlight and signal-lamp; the headlight was making a brilliant light; it was very light. We were 55 or 60 feet from the car when he said, "There is a car on the track." It was about a car length and a half or two car lengths when he said that. I stepped off; the track is 4 feet 8½ inches wide; I was riding about over the rail on the east side; all I had to do was just to step down. Mr. Douglas must have been about the same place I was, that is over the rail; Mr. Conarty was in the middle of the track; Mr. Douglas was between Mr. Conarty and the end of the footboard. After the accident I went around to the front end of the engine and Mr. Conarty was lying there across the pilot beam, his right shoulder on the cylinder and the side of his face on the steam chest. Mr. Conarty rode there because it was his place on the footboard for the purpose of performing his duties; it was necessary to ride there to make couplings and to see that couplings were made with cars; always ride on the end of the engine that you are working with. I suppose the coupler on the engine protruded or extended over the footboard two feet or something near that; we were moving six or seven miles an hour when he said there was a car on the track; Mr. Douglas gave the signal to the engineer which caused him to set his brake, which reduced the speed; really don't know how fast the car was moving

at the time of the collision; the speed had been reduced quite a good deal; the engine traveled about the length of the engine and tank after the brakes were applied. When we lifted Mr. Conarty from the pilot beam he was bleeding at the mouth and had several holes punched in his leg; it must have been the bolts in the car that punched holes in the leg. I saw the drawbar in the car was gone; there were some bolts there in the end of the car extending out probably an inch or an inch and a half. It was a bolt that runs from one end of the car to the other; it was not bolts connected with the draft rigging whatever; it was loaded with coal; lettered N. O. & N. E. I have been handling these couplers about eleven years; our engine had that kind of a coupler; it was in good condition.

Over objection the following questions were asked and answered:

Q. Now what effect and what would have been the result if this coal car had have had a drawhead in it; what effect would it have had if this coal car had have had a drawhead in it that was in good order; what effect would that collision have had there as to coupling onto the coal car, the engine coupling onto it?

A. I don't believe it would have had any effect.

Q. Would it have coupled to the coal car if the coupler on the coal car had been in good condition?

A. If the end knuckles were open; yes, sir.

Q. Suppose the knuckles had been closed?

A. If the knuckles had been closed it would have shoved the car away from the engine.

Q. When it struck?

A. Yes, sir.

Exceptions were saved as to the above (P. R., p. 37).

When the cars were coupled to the engine there would have been a space from the footboard over that three and one-half, probably four feet in some cars; on some cars the drawbar sticks out further than on others; couplings are made with brakemen or switchmen standing on the footboard with coal car and box cars in the yards; it is a frequent occurrence, every day.

Over objection of defendant the following testimony was admitted:

> Q. Now, if this engine had been traveling at the rate of five or six miles an hour and come in contact with that coal car there and the knuckles had been open, you say the effect would have been to couple onto the coal car; that is if the coal car had been equipped with a drawbar in good condition?
>
> A. Yes, sir.
>
> Q. If the knuckles had been closed it would just simply of pushed the coal car out of the way and give more space between the engine and coal car?
>
> A. Ordinarily; yes, sir.

To the admission of which the defendant excepted (P. R., pp. 30-38).

Cross-Examination.

We had been working in the city yards; knew the other engine was near that end of the yard; did not know what they were doing; I knew that these tracks were pulled every night; in pulling these tracks it is necessary to draw those cars out on the main line. The running-board or footboard on the front of the engine is about a foot or 16 inches wide; the rails are 4 feet 8 inches apart; the coupling on the engine attached to the pilot occupies about two feet. Where you stand on each side of the drawbar is probably about three feet

wide or a little better; if you were standing over the outside rail that would leave less than two feet on each side; the one who is standing on the inside is only about two feet further from the outside than the man who stood next to him, just one step; we had started from the yard to go up and switch 735, a train that was coming in from the north; we had no thought of handling this car on the main line; we had nothing to do with that; the headlight of the other train was shining in my face and was what blinded me; but for that we would have seen the coal car a good deal further, I think. Mr. Conarty was the first to see it; he spoke promptly, "There is a car." I at once stepped off.

Q. Did he have time to step off?

A. Well, he had about forty-five or fifty feet.

Q. How far did you get before you stepped off?

A. Five or six or ten feet.

Q. And the engine was getting slower all the time as it went toward the car?

A. Yes, sir.

Q. Why did you step off?

A. Because I seen the car didn't have no drawbar in it.

Q. Didn't you see you were going to collide with it?

A. Yes, sir; I thought so anyway. I thought it strong enough to get off.

Q. Mr. Douglass did also, did he?

A. Yes, sir.

Q. Mr. Daniels, you say men stay on the footboard and couple cars; don't those cars couple without the brakemen having anything to do with it?

A. Sometimes; they are supposed to be automatic couplers; yes, sir.

Q. And your duty don't require you to stand there to make couplings?

A. No, sir.

Q. You are not required to stay on the footboard to couple at all?

A. No, sir.

Q. Those couplers couple by impact and you don't have to go between the cars nor to stay on the footboard to couple or uncouple?

A. No, sir.

Q. Was there any duty that required Mr. Conarty to stay there to couple the car they were colliding with?

A. No, sir.

Q. Was it very apparent that you were going to collide with the car?

A. Yes, sir.

Q. Did you see Mr. Conarty make any attempt at all to step off?

A. No, sir.

After the engine collided with the car I was standing at the rear footboard; that would be the length of the engine and tank, I suppose about fifty feet; it run about fifty feet after I stepped off.

A Juror: Didn't you state a while ago it was his duty to stand there to do the coupling on that engine?

A. I said it was his duty to be on the footboard.

Q. What he was there for was to couple with the other cars?

A. We were going from the city yards down there and you either have to be on the footboard or up in the engine to ride.

Q. This coupling bar, does it lie down on the cowcatcher or does it extend up above it?

A. Extends up above; it is stationary.

Q. It is on a level with this other car?
A. It is the standard height.

On this occasion we got on the footboard to ride down the yards; we were just simply going to ride from where we were down to the other part of the yards; there was no duty that required us to be on the footboard to couple; we were not contemplating coupling onto any car until we went up to get this other train; the train was facing us; we were going to wait for the engine to pull off to get the engine out of the scale track and get hold from the south end; I suppose the engine was about 400 yards from us; the bar going through the length of the car had nothing to do with the coupling; they were put there to hold the end sills; that is the rod I spoke of that projected; I understood this coal car was brought from Jenson for heavy repairs, such heavy repairs as they do at Fort Smith (P. R., pp. 39-42).

Redirect Examination.

Q. Mr. Daniels, you were not on that footboard for fun, were you?
A. No, sir.
Q. You were required to be there?
A. Yes, sir.
Q. And so was Conarty?
A. Yes, sir.
Q. Wasn't Conarty required to stand so if the coupling should not work, if the knuckles were not open he could raise the pin, so the coupling would be made?
A. You are not supposed to do it.
Q. Didn't you do it?
A. It is done.

Q. And that is what he was there for; to see that that knuckle was open?

A. Yes, sir; that is what he was put there for (P. R., p. 42).

Recross-Examination.

Q. Are you not forbidden to go between the cars to see about the coupling?

A. While in motion; yes, sir.

Q. Your duties do not require you to go between the cars while they are in motion, to open the knuckles?

A. No, sir.

Q. And they do not, under any circumstances, require you to go between the cars while they are in motion?

A. No, sir.

Q. Provision is made by which you can do that without going in there?

A. Either that or stop the engine.

Q. You were simply on that footboard for the purpose of riding from one point of the yard to the other?

A. Yes, sir (P. R., p. 42).

F. T. Woolum testified: Live in Van Buren; followed railroading up to six years ago; worked for the Iron Mountain; have worked for the Frisco; left there in 1887; on the Iron Mountain, I broke four or five months and the balance of time was conductor; broke on the Frisco for four years; never worked as a switchman in the yards in my life; I think I am familiar with the automatic coupler.

Over objection of defendant, the following testimony was admitted:

Q. State whether or not those couplers are so

constructed that when they come together they will couple by the impact.

A. They do, providing the drawheads are properly adjusted.

Q. Ordinarily, from your experience and observation as a railroad man, what effect would an engine approaching a car with a coupler like the one I have asked you about, the engine, I mean, and a car equipped with that kind of coupler, and they would come together five or six miles an hour, what effect would they have if they came together?

A. They would couple together.

Q. What effect, if any, would it have—say the switchman was standing near the drawhead on the engine on the footboard, what effect would that have on him if they were coming together five or six miles an hour?

A. I don't think it would have any.

Q. Ordinarily, between the front end of the switch engine and a car that is equipped as I have asked you about, how much space would there be between the footboard that I have asked you about and the end of the car they were trying to couple?

A. May I modify that a little bit by showing the timber that runs under there in front?

Q. Yes.

A. Well, I presume it is three feet between that timber and the car, maybe a little further.

To the asking and answering of each and every one of said questions the defendant at the time objected and excepted (Tr., pp. 42-44).

George Lindsey (colored) testified: I am working for the Arkansas Cotton Oil Mill; the building is on the west side of the Frisco railroad tracks; I was night watchman in November, 1910; don't know whether I

saw Mr. Conarty; I seen the switch engine pass several times; saw it going north up about the Border City Ice Factory; there was a box-car and I think a flat coal car on the main line; think the box-car was on the north end of the flat-car; don't know whether they were attached; were right close together. I was about a block away; the coal car was on the south end of the box-car.

Q. Now, did you hear anything after this engine went down in that direction, make a noise in any way or did you see the collision?

A. No, sir, I was too far off to see it; I heard a noise and I didn't think at the time—I thought they didn't strike the drawbar.

Q. How far away were you and what direction from these cars at the time the engine struck them?

A. I was north of them just below the oil mill crossing.

Q. About how far were you from the cars?

A. About a block, I think.

Q. Did you notice this coal car after the collision; did you go up there?

A. Yes, sir; I was there the second time.

Q. Were these cars moved from the place after the collision?

A. Yes, sir.

Q. Who took them away; how were they taken away?

A. Another switch engine come up there and got them.

Don't know how long these cars had been there; they were up there when I seen this engine going up that way twenty-five or thirty minutes after I heard the noise until the engine come and got the coal car; I had

been down to the north end of the oil house, was going up the Frisco track.

Q. Now, before you saw this engine coming and then heard this noise, had you seen an engine with some cars attached to it going toward the river or not?

A. I don't know. I believe there was. I believe there was a switch engine down below me at some crossing, but I won't say. I didn't pay much attention to them. There was three engines north of me, two of them was freights I am satisfied. One of them was facing to go south and one had just come in from the north.

Q. What were the three engines doing?

A. I think they were switching.

Q. How long after you—after that was it until you saw the engine coming and heard it strike this car?

A. I guess it was about four or five minutes. I poked along up the track there. I guess maybe it was about ten minutes.

Q. When you went up there—you say you went up there the second time—did you see any engine east or north of you at that time?

A. There was an engine down there, but I don't know whether it was a switch engine or not.

Q. How far from you?

A. About two blocks, I guess; about the lower end of the oil mill.

Q. Had you seen this coal car any time in the yard before that time?

A. Not as I know of; didn't never notice the number. If I had noticed the number I could have said.

Q. Please state whether or not at the time that

engine struck the cars if you were looking at them.

A. I might have been looking up that way, but I couldn't see them; it was dark; I don't know— I was walking going that way south, but I could not exactly say that I seen it, but then I know that those cars moved; they were on the main line and they moved after they struck it.

Q. How far did they move?

A. I don't know; about the length of that coal car, I think (P. R., pp. 45-48).

Cross-Examination.

I watch around the outside to see if there is any fire; the building, I guess, is about three blocks long; I walk around it once every hour; I came out of the office at the north end, walked south to the end of the building west of the Iron Mountain tracks, north to the north end of the building, then east to the Frisco tracks, then down the Frisco tracks. After I had walked all this round and had got back to the side of the Hull House at the north end of the oil mill I heard the collision; I saw the box-car then; there were five or six or seven tracks at that point; one west of the main line, and I think six east.

Q. You saw a box-car standing there; was it attached to the coal car?

A. I don't know, sir.

Q. Was it up against it?

A. I don't know that.

Q. Was it as much as five or ten feet from it?

A. I couldn't say.

Q. Do you think it was on the same track?

A. I know it was on the same track.

Q. How close were you to it at the time you saw it?

A. I was down, I reckon, two, maybe three, lots; about 150 feet.

Q. It was in the night time?

A. Yes, sir.

Q. Was there any street light burning there?

A. No, sir; there was two headlights on the engines up there burning.

Q. Were they coming toward you?

A. Both of them were headed south.

Q. And it was by them that you saw the coal car?

A. I didn't see the coal car; I saw the box car.

Q. When did you see the coal car first?

A. When I went up there after I heard this noise.

Q. That is the first you saw of the coal car?

A. Yes, sir.

Q. You didn't see the switch engine come down there with 13 or 14 cars just before that, did you?

A. No, sir.

Q. Didn't see any switch engine at all, coming from the east, from the north down south?

A. No, sir; I didn't see none down there, but this switch engine (P. R., pp. 48-50).

Mrs. Fannie M. Conarty testified: Am the widow of Greer Conarty and administratrix; he left the children named.

Over objection of defendant, because the plaintiff was the wife and administratrix of the estate of deceased, and was incompetent to testify, the following testimony was admitted, to which the defendant excepted:

Q. Now, how much money did your husband

give you for the support and maintenance of your family, Mrs. Conarty, about how much money per month or per year during his life did he contribute to you or give you for your support and maintenance and that of your children?

A. Well, you see Mr. Conarty's check varied; some months he drew a good check and others he did not, but I cashed more of his checks than he did.

Q. What were his checks?

A. The last check he gave me was for two weeks' wages, somewhere between $73 and $74 from the first to the 13th.

Q. Of what month?

A. The last check he made was in November, somewhere between $70, $72 or $73, I don't remember; something more than $70.

To the admission of each and every one of said questions and answers, defendant at the time excepted (P. R., p. 51).

And over objections for same reasons, the following testimony was admitted:

Q. Now, how often did he contribute money to you and to your children, Mrs. Conarty, every two weeks or every thirty days?

A. Every two weeks.

To the admission of which defendant excepted (P. R., pp. 51-52).

I had no other means of support for myself and children.

(Witness describes the injuries of her husband and his pain and suffering in the hospital.)

Over objection of defendant, for the reason that the

witness was the wife and administratrix of deceased, and the testimony inadmissible and incompetent, and she being incompetent to testify as to transactions of deceased, the following testimony was admitted:

> Q. On an average per month during the last year of his life, about how much would he contribute toward your support, just take an average, not any one month, but on an average, would it be as much as $140 per month or $100 per month or what was it?
>
> A. Well, I suppose about $125 or $130 per month.
>
> Q. That extended through the last year of his life?
>
> A. Yes, sir.

To the admission of which defendant at the time excepted (P. R., pp. 50-54).

John Lake testified to conscious pain and suffering of deceased and that he cashed a railroad check for around $80 for deceased after the injury (P. R., pp. 56-59).

Mrs. Fannie M. Conarty, recalled, testified:

Over objection of defendant, for same reasons as heretofore stated, the following was admitted:

> Q. State whether or not you handled your husband's checks for the month of October, the month before the injury in November, whether you had the check or not?
>
> A. I did.
>
> Q. What was the amount of that check from your best recollection?
>
> A. Well, as well as I can remember, it must have been something between $133, $134 or $135.

Q. Now, I will ask you to state if you used the money for your own support and that of your children?

A. I did.

To the admission of each of said questions and answers, defendant at the time excepted (P. R., p. 63).

DEFENDANT'S TESTIMONY.

Agreement.

It is agreed by both parties that the car in question with which the engine collided had been loaded with coal at Huntington and had been consigned to some point in Texas; that by some means the car was disabled, requiring heavy repairs, and for the purpose of making those heavy repairs it was brought from Jenson, which was on the line of road of consignment, from the point of origin to destination, to the City of Fort Smith, a distance of fourteen miles off the route to the nearest point where the Frisco Railroad Company had repair shops, for the purpose of making repairs of this character, and that repairs of this character could not be made at Jenson where the car had become disabled; that it arrived at Fort Smith on November 9th, 1910, and was placed upon a storage track for storing disabled cars which storage track contained nothing but disabled cars; that the repair tracks, three in number, upon which repairs were made were at this time all occupied with damaged cars that were being repaired and that the track upon which this car was placed was a track that was used for storage purposes only when it was necessary to store cars on anything except the repair tracks. It is also admitted that the

coal car in question had been disabled and that there was no safety appliance on the west end of the car that would couple it to other cars when they came in contact; that there was no coupler at all upon that end of the car; that the draft timbers and head blocks were out of that end of the car and dead timbers and mann blocks; that the track upon which the damaged cars were stored, including the one in controversy, when not being used as a storage track for disabled cars, were used for commercial purposes; including all classes of cars.

It is conceded that the disabled car in transit from Jenson, Arkansas, to Fort Smith, Arkansas, passed through a portion of the State of Oklahoma (P. R., p. 64)..

W. L. Corroto testified: Am running an engine for the Frisco; have had twelve years' experience; was on the engine the night Conarty was injured; had been doing some work on the house track; had shoved some cars on the team track, and was going down the main line for the purpose of switching freight train 735, switching cars in station order; there were two switching crews in the yards at night; in switching it is necessary to use the main line and to leave cars upon the main line; did not know what kind of cars they were handling; knew the part of the yard they were working in; we were going down the main line and the switching crew was standing on the front footboard, and about 100 or 150 feet north of E street I got a signal and stopped the engine as quick as I could and the switchman on both sides jumped off the footboard and we rolled up to a car just about like we were going to make an ordinary coupling. I applied

the emergency brake and just barely hit the car, and I suppose the car rolled about ten or twelve or fifteen feet. Seven thirty-five had pulled in on the scale track; the electric headlight was shining in our eyes; of course that bothered us of seeing anything until we got right up at it. I failed to see the coal car until I got the signal from the switchman; I was higher than the switchmen looking ahead; looked right over the car; of course when I got right up to it I could see it; those on the footboard were closer to the car and also lower; we were not contemplating hitching onto this car at all; our crew had nothing to do with handling this car (P. R., pp. 65-66).

Cross-Examination.

Engineer Vogel was in the north part of the yard; when we went over to the lower or south yard we did not know what the crew below was going to do; did not know they were going to put any cars on the main line, nor where they were going to put them; the men were under instructions from Mr. Armstrong, general yardmaster; we went to this yard by direction of Mr. Douglass; he tells the engine men where he wants to go; we work by signals; he gets his orders from Mr. Armstrong. I stopped the engine as quick as I could stop it after I got the signal. The engine barely moved up to it. It was a light car, small car; it moved ten or twelve or fifteen feet, I suppose; I have been in the yards about eight years.

Over objection of defendant the following question was asked and answered:

Q. If this coal car had had a coupler in good

condition in the end of it, what effect would it have had on Mr. Conarty?

A. Just about made a coupling.

To the admission of which defendant excepted (P. R., p. 67).

Q. There would have been no injury to Mr. Conarty on the footboard if the coupling had been made?

A. Well, I don't believe there would.

If there had been no drawhead, I suppose the coupler would just about slip under the sill and let the front end of the engine go on up against the car (P. R., pp. 66-68).

Redirect Examination.

We were not contemplating hitching onto that car; were not attempting to handle the car; the reason we did not hit it harder was because we discovered it that soon and if we had discovered it sooner, we could have avoided hitting it.

Q. State whether there is a rule that requires you to anticipate that cars would be on the main line at any time in switching, excepting when passenger trains are due?

A. Yes, sir.

Q. Then, you were required to look out for cars on the main line and anticipate that the main line would have them on it?

A. Yes, sir. Where the yards are blocked that way, of course, we expect to find the cars wherever we are switching, on the main line, side track or anywhere.

Q. There was no passenger train due at that time?

A. No, sir.

Q. And under the instructions and rules of the Company, you were required to anticipate that cars would be on the main line at that time?

A. Yes, sir.

Q. These men were on the footboard for the purpose of watching, seeing there would be no obstructions, were they not?

A. They were supposed to watch out, yes, sir. Of course, running an engine like that, they are supposed to work by signals. A man can't tell where he is going on an engine that way. They are supposed to work under a signal and that is all they have to go by.

Q. The fact that you were blinded by that headlight prevented your seeing the car much sooner; you could have seen it much sooner?

A. I believe I could (P. R., p. 68).

Recross-Examination.

Q. You would not expect to find cars on the main track at any time that had no drawhead in them?

A. Yes, sir; we might find any kind of a car; might find a good car (P. R., p. 68).

S. A. Douglass testified: Am engaged in switching; have been working for the Frisco a little over fourteen years; was foreman of the switch engine when Conarty met his death. Was standing on the front footboard of the switch engine; Conarty was standing between me and the drawbar; we were standing side by side; what first called my attention, Mr. Conarty said: "Look, there is a car." I gave a signal to stop, stepped right off, gave the signal at the same time; cannot say what Conarty did; I gave the signal and stepped

off and the engine passed me; when the engine stopped, I was standing about the rear end of the tank of the engine, when it hit the car; I gave the signal to stop and stepped right off; the engine moved about its length; there was only one car there loaded with coal; the engine collided with it; we were not contemplating hitching onto the car, coupling onto that car at all; did not know it was there until we saw it; a train pulling in down on the scale track, the headlight was shining in our faces, which prevented us seeing it sooner, I suppose (P. R., pp. 60-70).

Cross-Examination.

The engine foreman in the crew working in the north yard was Hetherington; I did not have any idea what they were doing; I got off on the east side; suppose I went over to the next track a distance of eight feet; Mr. Daniels got off on the west side; I did not look around to see Mr. Conarty; thought he got right off after me; the drawbar was between Conarty and Daniels; did not know that this car was going to be on the track when we started down; do not suppose Conarty did; if they got this car out of track No. 2 and left it there, they would pull it over a quarter of a mile; in pulling out of track No. 2, as a rule, we pulled them at either end (P. R., p. 70).

Redirect Examination.

In taking cars off of track No. 2, if the car on the west end was without a coupling; we would have to hitch onto the string and pull it out on the east end and would have to go on the main track and if they wanted to put it on the repair track, would have to shove it down the length of a train to push it out on

the main line; there was nothing to prevent Conarty stepping off after me; he could have followed me right off; it would not have taken more than a step more than I made, to step off; the step we were riding on was about six or eight inches above the rail; that is all we had to step to get down (P. R., pp. 71-72).

W. L. Corroto, recalled, testified: There was no other car standing on the track with the coal car that I know of; I did not see any car (P. R., p. 72).

Roy Hetherington testified: I am a switchman; have had nine years' experience; was working for the Frisco on the night of the accident; went to work at 8 o'clock; the crew consisted of Barthel, switchman, Bert Fields, switchman, Charley Vogel, engineer, John Gosset, fireman; we were switching in the east end of the yards toward midnight; the following tracks are in the east yards; rip tracks, coach tracks, four other storage tracks, one, two, three and four; we were engaged in pulling the rip track, taking cars that are O.K.'d off the bad-order track, that is, the cars that had been repaired and ready to go out; the cars that had been fixed that day we would have to pull them every evening and fill it up again with bad-order cars. We had taken the repaired cars off the repair track and distributed them around through the yards where they belonged; I then went to the east end of track No. 2 and got 14 or 15 bad-order cars.

The Court (Q.): Went to the east end of No. 2?
A. Yes, sir.
The Court (Q.): Repair track?
A. No, storage track.
The Court (Q.): You say you went to the east end of No. 2 storage track; do you mean to say

that you use a storage track for both disabled cars and repaired cars?

A. Yes, sir.

The Court (Q.): You say you took the cars from the repair track and put them on the storage track; is that right?

A. Yes, sir.

Q. Now, where is the track upon which you had your damaged cars stored; what is the number of that track?

A. Track No. 2.

Q. Did you take the cars that were repaired off of any track; if so, what track did you take them from that night?

A. Off of this No. 2 track; those that had already been repaired.

Q. Where did you deposit those cars?

A. Some of them went into No. 2 and 3 tracks and some of them went in other parts of the yard.

Q. You left them in accordance with where they were to go?

A. Yes, sir.

Q. After having pulled the repair track then what did you do?

A. I went to the east end of No. 2 and got fourteen or fifteen bad-orders.

Q. Were they all bad-orders?

A. Yes, sir.

Q. You went to the east end of No. 2 and got the bad-order cars that were on No. 2?

A. Yes, sir.

Q. Was that used for a repair track or storage track?

A. Storage track.

Q. Was there anything else on No. 2 except bad-order cars?

A. Yes, sir.

Q. What else?

A. Full of cars in there that went south.

Q. But it was only the bad-order cars that you took out of there?

A. Yes, sir.

Q. Were they marked or designated in any way?

A. They had bad-order tags on them.

Q. Explain to the jury what a bad-order tag is like.

A. It is a card about six inches long and four inches wide with "Bad Order" in large letters on it.

Q. Now, those cards were on each one of those bad-order cars?

A. Yes, sir.

Q. Were they separated at one end of that track or mixed up?

A. They were all together.

Q. On the east end?

A. Yes, sir.

Did not draw them any further than necessary to clear the north end of the switch, then shoved them (string of bad-order cars) right up the main line south; told Barthel to cut off the rear car on the main line and make a drop of the balance; we cut the rear car off on account of the drawbar being out of the west end. By drop I mean to get the cars ahead of the engine; we get the cars to running pretty fast, cut the engine off, the engine goes down one track, you throw the switch and let the cars go down the other; we accomplished that drop and these bad-order cars were run in on rip track No. 3; there were about thirteen or fourteen of them; the engine went down the main line about sixty feet, just far enough to clear the switch; that is the ordinary way to accomplish that; as soon as that was done the engine started back on the main line after

this bad-order car we had left; in a few minutes after I learned of the collision; our engine was going up the main line after this car when the other engine hit it; I had to get these cars by me to place them on the rip track and could not handle it because it had no draw-bar in that end; could not hook onto it from that end of the car and was going to couple onto it at the east end take it to the east end of rip No. 1; our engine would be ahead of the car.

Q. You would go down the rip track, pass your fourteen other cars that you had left, that you had switched off there, but on another track; you would pass those and then shove it back from the end of that switch onto track number what?

A. No. 1.

Q. Those other cars were on track number what?

A. No. 3.

A Juror: Did I understand you to say a while ago that the repair tracks, 1, 2 and 3, connected with the main line on each end; you could get to them from either end the track?

A. Yes, sir.

We made the flying switch without any interference, with perfect safety.

Q. Tell the Court and jury whether or not you could have handled this bad-order car in any other way with the same degree of safety.

A. I don't see how I could.

Q. Tell the Court whether or not the other switching crew had anything to do with the handling of this coal car?

A. No, sir.

Q. Was that under your supervision?

A. Yes, sir.

Q. Could you handle these bad-order cars with-

out interfering with those other cars that were on track No. 2?

A. Yes, sir.

Had worked in those yards nine years.

Q. When bad-order cars are set out and the rip tracks are full, where do you put them?

A. We generally have a storage track for them.

Q. You store them in a bunch, do you?

A. Yes, sir; all together.

Q. And you mark them, do you?

A. Yes, sir.

Q. And your crew attends to handling them, does it?

A. Yes, sir.

Q. Do you mix them up promiscuously with other cars?

A. No, sir.

Q. You separate them from the cars you are using in commerce, do you?

A. Yes, sir. (P. R., pp. 73-77.)

Cross-Examination.

My duty as switchman requires me to work all over the yards; my crew is known as the outside crew. They do the work pulling the rip track, all the outside work. The inside crew was the one Mr. Conarty was a member of; they switch trains and make up trains and break up trains when they come in. Conarty's duty did not require him to work these rip tracks nor to have anything to do with bad-order cars; the only time they handled bad-order cars would be when they were switching a train they would throw bad-order cars out.

Q. If the train came in with broken brake-beams or anything of that kind the car would be thrown out onto the storage track?

A. Yes, sir.

Q. After that he had nothing to do with those bad-order cars?

A. No, sir.

Don't know when this bad-order car was put on track No. 2; I first saw it that night. Had nothing but the engine when we went to pull the cars off storage track No. 2. When we left the coal car we did not leave a box-car; the drawhead in the east end of the coal car was all right; it would couple by impact; I knew the drawhead was out when I left the car there; knew Mr. Conarty and his engine were in the east yards, but did not know what they was doing; knew they were likely to come down the main track any moment (P. R., pp. 77-82).

Redirect Examination.

Did not go any further on the main line than was necessary to do the switching when we pulled the cars out and no further south than was necessary in order to make the running switch; had to handle these cars from the east end because we could not hook onto the west end; we had a book of rules and these are put in the hands of the switching crew. Rule 93 is as follows: "Within yard limits the main track may be used protecting against first-class trains. Second and third-class and extra trains must move within yard limits prepared to stop unless the main track is seen or known to be clear."

That rule was in force at that time and had been for quite a period of time before that; we were inside of the yard limits switching in the ordinary way. When I went back to where Conarty was hurt the engine was

up there with this car; it was four or five minutes from the time we left the car standing there until the engine was back there to pull it away; there was no box-car there; there was no box-car on the main track that night standing still up to the time of the injury except the box-cars we had in switching; passed over this track going north about five minutes before the accident and there was none there; there were some standing on the track close to this on the east side, a bunch of cars at various places.

Q. When those bad-order cars are bunched that way, stored there, all of the employes understand that they are not to be interfered with unless the men are sent there for that purpose?

A. Yes, sir.

Q. Do you handle them in connection with other cars at all after they have been stored?

A. No, sir.

Q. Had you previously handled this car?

A. No, sir; never seen it before.

Don't know whether the other crew handled it or not; a car that is damaged is set out on the storage track; if the repair track is clear we put all we can on the repair track; in putting them on the repair tracks we do not leave them in a bunch; we separate them about four or five feet apart so the men can work on them; if the engine had been on the other end of that train we could not have done that if this bad-order car had been there (P. R., pp. 82-84).

Recross-Examination.

Rule 93 was for the benefit of switchmen, trainmen and all concerned.

Rule 93, page 25, of book of rules of the transporta-

tion department, taking effect February 1st, 1909, read into the record. (Heretofore copied, P. R., pp. 84-85).

Robert Birchfield testified: Am a switchman; was with the outside crew the night Conarty was killed; it was not Conarty's crew; we switch the repair tracks to clear them, distribute the cars on the repair track; after the repair tracks were emptied we went to repair track No. 2 at the east end of the yards and got a bunch of bad-order cars where they had been stored, and placed them in the place of the ones we had taken off; we left the coal car on the main line; dropped the other cars into the repair track; returned to get the coal car; there was no other car left there with the coal car; returned with a light engine; I learned of the injury about five or six minutes after we had made the drop; went on back and found the parties there; we were in the act of returning for this car when the injury occurred (P. R., pp. 85-86).

Cross-Examination.

Have been a switchman six or seven years; have no regular hours at night to pull the repair track; as a rule pull them at ten-thirty; eleven or twelve, three or four, most any time of night; we put good cars on one end of track No. 2 and bad cars on the other. We put the coal car up where Mr. Conarty ran into it; that is the only way we could handle it to get it to the repair tracks (P. R., p. 86).

C. Vogel testified: I was engineer on the engine doing the switching the night when we left that car on the main line and went back after it; there was just one car, a coal car left there (P. R., p. 87).

After all the testimony was in the defendant filed a motion in words and figures as follows (caption omitted):

> "The defendant, not waiving its right under its demurrer and protesting against being required to answer further, moves the Court to require the plaintiff to elect whether or not she will prosecute her cause of action as administratrix for compensation for the next of kin or whether or not she will prosecute the cause of action for the pain and suffering endured by W. G. Conarty on account of the injuries alleged."

Which motion was overruled and defendant excepted (P. R., p. 88).

And thereupon, the defendant moved the Court to instruct the jury as follows:

(A) The evidence in this cause does not warrant a recovery on behalf of plaintiff. You will therefore find the issues for defendant. (Refused)

(B) Under the evidence in this cause it was not negligence to leave this car on the main line. (Refused)

(C) I charge you that under the undisputed evidence in this cause the car was not at the time of the injury engaged in interstate commerce. You will therefore find the issues for defendant. (Refused)

To the refusal of the Court to give each and every one of said instructions defendant excepted.

The Court having refused the above instructions, the defendant moved the Court to instruct the jury as follows:

DEFENDANT'S REFUSED INSTRUCTIONS.

I.

I charge you that under the undisputed evidence in this cause the defective condition of the car was not the proximate cause of the injury. Refused.

II.

If you find from the evidence that the car was being shifted from a track used for storage of bad-order cars to the track upon which repairs were made; that while upon the main line the deceased was injured by his engine colliding with this car, defendant would not be liable. Refused.

III.

If you find from the evidence that the car in question was loaded with coal at Huntington, Ark., in the State of Arkansas, and was billed to some point in the State of Texas; that after it had been so loaded it was damaged in some way; that the drawbar and couplings were broken so that it could not be safely forwarded in the train; that the employes of the railroad company, for the purpose of repairing said car, caused the same to be transported to Fort Smith, a point where repairs of this character were made; that said car had been placed on a siding near the repair track which was used at this time only for storing cars that were in bad order; that the repair tracks where repairs were made were full of damaged cars at the time; that in the regular course of business it became necessary for the yard switching crew to move said car onto the repair track in order to have the car repaired; that in so doing the switch engine in the City of Fort Smith placed it

upon the main track in the usual and ordinary way; that the crew handling it in the manner in which they were handling it could have placed it upon the repair track without any danger to said crew; that an order of the railroad company had been made and promulgated long prior to this time, which was read to you as rule No. ——, then I charge you that there would have been no negligence in leaving said car upon the main line for said purposes.

Refused.

IV.

If you find from the evidence that the car in question had been loaded with coal at Huntington and had been consigned to some point in Texas, had been damaged so that it could not be transported in the trains to said point; that defendant had sent it to Fort Smith, a point where such repairs were made, for the purpose of having it repaired; that said car had been delivered in the yards at Fort Smith and had been placed upon a track used only to store damaged cars on and was waiting to be repaired in its order and was being shifted for that purpose, then I charge you that said car was not engaged in interstate commerce at the time of said injury.

Refused.

V.

If said car was not engaged in interstate commerce at the time of the injury the defendant would not be liable for any injury inflicted on account of any defect in the coupling.

Refused.

VI.

I charge you that the defective coupling or damaged condition of the coupling was not the proximate cause of the injury to deceased.

Refused.

VII.

I charge you that no negligence has been shown upon the part of the switching crew that moved the car in question and left it upon the main line and that the leaving of said car upon the main line was not negligence. Refused.

VIII.

If you find from the evidence that a freight train came in facing deceased and the trainmen on the engine on which he was riding, as it was approaching the car standing on the main line; that the electric headlight of the train coming in so blinded the employes on the engine that they did not see the freight car standing on the main line, and this engine was thereby caused to collide with it, thereby causing the injury, and that said collision was caused by the fact of the electric light blinding the employes on the engine so that they did not see the car standing on the main line in time to avoid the injury, then the injury would be the result of an accident and not of negligence and plaintiff cannot recover. Refused.

IX.

I charge you that you will not consider the fact of the damaged condition of the car standing upon the main line as constituting negligence. Refused.

X.

If you find from the evidence that deceased's disobedience of the rules of the company was the cause of the injury, you will find for the defendant.

Refused.

XI.

If you find from the evidence that deceased could have easily stepped from the footboard and have avoided the injury and he negligently failed to do so, he caused or contributed to the injury and plaintiff cannot recover. Refused.

XII.

If deceased negligently remained on the footboard when no duty required him to do so and was thereby injured, plaintiff cannot recover. Refused.

XIII.

If you find for the plaintiff you should take in consideration the fact that such sum as you find will be payable in the future at intervals as deceased might have contributed them, and in estimating the value of the contributions he might have made in the future you should take the present value, and in determining the amount, you should not consider the injured feelings, or sentiment of his family. It is only for the pecuniary loss that the law makes compensation. Refused.

(Modification asked): The compensation as to the children should be limited to their minority.

Refused.

XIV.

If you find that the defendant was guilty of any act that rendered it liable then you will consider whether or not deceased was guilty of any act of negligence that caused or contributed to cause his injury. If you find that deceased negligently remained on the footboard when he knew that the engine was going to collide with a car, when no duty required him to do so, then he was guilty of contributory negligence.

Refused.

To the refusal of the Court to give each and every one of said instructions defendant excepted.

And thereupon the Court instructed the jury as follows:

COURT'S GIVEN INSTRUCTIONS.

1.

Gentlemen of the jury: In this case, the coal car with which the engine collided was, within the meaning of the Act of Congress, an interstate car, and was required to be equipped with safety appliances of an automatic coupler and a drawbar of uniform height. It is admitted that the car was not equipped as required by the Safety Appliance Act of Congress with drawbar and automatic coupler.

2.

If this want of equipment as required by the Safety Appliance Act was the proximate cause of the injury and death of Conarty, the defendant is liable and you should so find. If the want of equipment as above indicated was not the cause of the injury and death of Conarty, or if it was a cause, but was not the proximate cause of the injury and death of Conarty, the defendant is not liable and you should so find. The proximate cause is the cause which, operating in its usual, ordinary and reasonably to be expected and anticipated course, produced the injury complained of. In this case, if the want of equipment as above indicated caused the injury and death of Conarty, in its usual, ordinary and reasonably to be expected operation, then it was the proximate cause of the injury. But, if the want of equipment as above indicated caused the injury, but did not cause it in the usual, ordinary and

reasonably to be expected operation and course, then it is not the proximate cause and defendant is not liable. If the injury sued for was one that could not ordinarily, usually and reasonably be expected from the want of equipment—was not the proximate cause of the injury and the defendant is not liable.

3.

If you find for the plaintiff, you will assess her recovery at such a sum as, from the evidence, will fairly compensate the widow and children for the pecuniary loss, if any, which they have sustained by reason of the death of Conarty; and in this may be included the value of the paternal care and instruction, if any, which the minor children may have lost by reason of the death of Conarty.

4.

You will also, if you find for plaintiff, state and find such an amount as, in your judgment from the evidence, will be a fair compensation for the conscious pain and suffering, if any, which Conarty endured after the injury and as a consequence thereof prior to his death.

5.

If you find for the defendant, you will so state in your verdict.

6.

You are the sole and exclusive judges of the credibility of the witnesses and of the weight to be attached to their testimony. In determining what weight you will give to the testimony of a witness, you may take

into consideration the witness' interest, if he has any, in the result of the trial, his bias or prejudice, if any, for or against either party, his means of knowing that about which he testifies, the reasonableness or unreasonableness of his statements and applying your knowledge of human actions, motives and affairs, you will find the truth and present that in your verdict.

7.

Negligence on the part of Conarty means the want on his part, if it existed, of reasonable and ordinary care for his own safety. If Conarty was wanting in ordinary and reasonable care for his own safety in remaining on the footboard after discovering the coal car on the track and such want of care was the primary cause of the injury and death of Conarty, the plaintiff cannot recover. But, if such want of care, if it existed, was not the primary cause, but only contributed to the injury sued for, then the plaintiff is not thereby barred from recovery. In such case, the negligence of the company sued for, if it existed, and proximately caused the injury and death of Conarty and the contributory negligence of Conarty, if it existed, may be considered and the amount of recovery, if any, should be diminished in proportion as the negligence of Conarty contributed to the injury.

8.

If Conarty discovered the car on the track and that it was without coupling appliances and then did not use ordinary and reasonable care for his own safety to avoid the injury, then such want of care was the primary cause of the injury and death and the plaintiff cannot recover. But, if he discovered the car on the

track, but did not discover that it was without coupling appliances, then his want of ordinary care for his own safety, if it existed, was not the primary cause of his injury and death, and if defendant was negligent in the particulars assigned in the complaint and this want of care on its part proximately caused or contributed to cause the injury and death sued for, the negligence of Conarty, if it existed, was what is called contributory negligence and should diminish proportionately plaintiff's recovery if you find for her.

9.

The only assignment of negligence in the complaint is the use of the coal car at the time of the injury without the safety appliances required by Act of Congress, and no other acts or omission of defendant's servants can be made the foundation of liability in this cause.

To the giving of said instructions and each and every one thereof, the defendant, at the time, objected and excepted.

Defendant objected to the giving of the first instruction because the facts of the case did not warrant it and because the car was not at the time of the accident engaged in interstate commerce, and the defective condition of the drawbar, as a matter of law, was not the proximate cause of the injury.

Objected to the giving of the second instruction because the facts of the case did not warrant it and because the undisputed facts of the case showed that the defective condition of the drawbar, as a matter of law, was not the proximate cause of the injury; that it was the duty of the Court to declare, under the evidence, whether or not this was the proximate cause,

and that the question of proximate cause should not have been left to the jury.

Objected to the giving of the fourth instruction because the Court submitted both the action for pain and suffering and compensation to next of kin to the jury, when the law requires that an election should be made as to which action plaintiff will prosecute.

Objected to the giving of the seventh instruction because it incorrectly stated the law as to contributory negligence.

Objected to the giving of the eighth instruction because it required that Conarty should have discovered that the car was without a coupling appliance before he was required to use ordinary and reasonable care for his own safety; that it exonerated Conarty from contributory negligence if he failed to discover that the car was without coupling appliances when there was no intention to couple to said car, and incorrectly stated the law of contributory negligence.

After the instructions of the Court and argument of counsel, the jury retired to consider of its verdict, and afterwards and upon the — day of June, returned into open court, the following verdict, to-wit:

"We, the jury, find for the plaintiff and assess the damages at ten thousand dollars, $10,000.00.

GEORGE HARRISON,
Foreman."

Thereupon, the defendant filed its motion for a new trial, which motion (with caption omitted) is in words and figures as follows:

MOTION FOR NEW TRIAL.

(1)

The Court erred in refusing to transfer this cause to the Federal Court.

(2)

The Court erred in overruling the demurrer to plaintiff's complaint.

(3)

The Court erred on the trial in allowing Mrs. Conarty, who was the wife and also the administratrix, to testify as to contributions made by her husband to herself; all of which was objected to at the time by the defendant.

(4)

The Court erred upon the trial in allowing the witnesses to give their opinions as to the effect of the coupling with a car that was equipped with a perfect automatic coupler, and in admitting proof as to the effect of a want of an automatic coupler in a collision when no coupling was intended to be made, all of which was objected to and excepted to by defendant at the time.

(5)

The Court erred in refusing to require the plaintiff to elect whether she would prosecute her cause of action for pain and suffering of deceased, or for compensation to the next of kin and in overruling defendant's motion to that effect after the testimony had been concluded.

(6)

The Court erred in giving instructions numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9, to the giving of each of said instructions the defendant at the time objected and excepted.

(7)

The Court erred in refusing to modify instruction No. 4 as moved by the defendant.

(8)

The Court erred in refusing to give each one of instructions (A), (B) and (C) and instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 asked by the defendant.

(9)

The verdict is contrary to and not supported by the evidence.

(10)

The verdict is contrary to law.

(11)

The verdict is excessive and not warranted by the evidence.

Wherefore, defendant prays that the judgment may be set aside and that a new trial be granted herein.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,

By B. R. DAVIDSON,

Attorney.

ASSIGNMENT OF ERRORS.

In the Supreme Court of the State of Arkansas.

Fanny M. Conarty, Administratrix of the Estate of W. G. Conarty, Deceased,
Plaintiff,

vs.

St. Louis & San Francisco Railroad Company,
Defendant.

Now comes the above-named defendant and files herewith its petition for writ of error and says that there are errors in the records and proceedings of the above-entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment of errors:

I.

The Supreme Court of Arkansas erred in holding and deciding that under the Employers' Liability Act as amended on April 5, 1910, that the defendant, a citizen of the State of Missouri, being a corporation organized under the laws of the State of Missouri, and the plaintiff, Fanny M. Conarty, and the deceased, W. G. Conarty, being residents and citizens of the State of Arkansas, said cause was not removable to the United States District Court from the State court in which said action was brought. The validity of said Employers' Liability Act denied to the defendant the right to transfer said cause to the Federal Court and the validity of said act was denied and drawn in question by the defendant on the ground that said act was repugnant to the Constitution of the United States and

in contravention thereof and is contrary to Article II, Section 1, Act III of the Constitution of the United States, which says: "The judicial power shall extend to all cases in law or in equity * * * between citizens of different states."

II.

The Supreme Court of Arkansas erred in holding and deciding that the car in question, which is alleged to have had a defective coupler (the cause of action being based upon an Act of Congress known as "The Safety Appliance Act" and amendments thereto and the Employers' Liability Act as amended on April 5, 1910), was engaged in interstate commerce at the time of the alleged injury received by W. G. Conarty, deceased, said fact being denied and drawn in question by the defendant in this cause.

III.

Said court erred in holding and deciding that the defective condition of the coupler of said car was the proximate cause of the injury to deceased, W. G. Conarty, which fact was denied and drawn in question by the defendant and plaintiff's recovery was sustained upon said holding.

IV.

Said Court erred in holding and deciding that the act of W. G. Conarty in remaining upon the footboard of the switch engine when he knew that the engine was going to collide with a standing freight car on the main line which he did not contemplate coupling to, and when no duty required him to remain there, was not negligence and was not the proximate cause of the injury.

V.

Said Supreme Court erred in holding that Fanny M. Conarty was a competent witness to testify as to transactions with deceased, the amount of contributions made by him to her at various times, she being administratrix and incompetent to testify to such facts under the Constitution of the State of Arkansas and the laws of the United States and her competency being denied and drawn in question by the defendant.

VI.

Said Supreme Court erred in deciding and holding that Lee Armstrong, W. J. Daniels and F. T. Wollum could testify, and allowing said witnesses to testify as to the effect of a collision of a car standing on the main track if the automatic coupler had been in perfect condition and what effect it would have on a brakeman standing on the footboard if such collision would occur, said testimony being objected to and the right to introduce the same being denied and drawn in question.

VII.

Said Supreme Court erred in holding and deciding that the plaintiff was not required to elect, under the laws of the United States, to-wit, the Employer's Liability Act as amended on April 5, 1910, whether or not she would prosecute her cause of action as administratrix for compensation for the next of kin or whether or not she would prosecute her cause of action for the pain and suffering endured by W. G. Conarty on account of the alleged injury, said motion being made, insisted upon and denied both by the trial court and the said Supreme Court.

VIII.

Said Supreme Court erred in holding and deciding that the facts proven in said cause constituted a cause of action against the defendant under the acts of Congress on which said action was based.

IX.

Said Supreme Court erred in holding and deciding that Congress had authority to legislate over a car in the condition of the one in question while being repaired and while not engaged in interstate commerce and in holding that said act under which said cause of action was prosecuted was valid as to the facts and circumstances shown in evidence.

X.

The trial court erred in refusing the peremptory instruction asked by the defendant, and the Supreme Court of Arkansas erred in sustaining such ruling.

For which errors the defendant, the St. Louis & San Francisco Railroad Company, prays that the said judgment of the Supreme Court of the State of Arkansas dated the 3rd day of February, 1913, be reversed and a judgment be entered in favor of the defendant and for costs.

W. F. EVANS,
B. R. DAVIDSON,
Attorneys for Defendant.

SPECIFICATIONS OF ERROR, POINTS AND AUTHORITIES.

I.

This cause, as disclosed by the record, should have been transferred to the Federal Court. The plaintiff and beneficiaries were residents and citizens of Arkansas, while plaintiff in error was a resident of Missouri and chartered under the laws of said State. A petition and bond were duly filed and a motion made to transfer said cause by reason of the diverse citizenship aforesaid. The bond was approved, the motion to transfer overruled and an exception duly saved as to said ruling (P. R., pp. 8 and 9).

(See First Assignment of Errors, P. R., p. 106.)

Constitution U. S., Sections 1 and 2 of Article III;

Van Brimmer v. *Texas P. Ry. Co.*, 190 Fed. 394-399 (Tex.);

State v. Coosaw Mining Co., 45 Fed. 804-810;

Gavin v. Vance, 33 Fed. 84-85;

Sharon v. Terry, 33 Fed. 337-355;

Martin v. Hunter, 1 Wheaton 304-327 (U. S.);

In re Woodbury *et al.*, 98 Fed. 833-837;

Gains v. Fuentes, 92 U. S. 10-17;

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362-391;

Robertson v. Baldwin, 165 U. S. 275-279;

Harrison v. St. L. & S. F. R. Co., 232 U. S. 318 (Ok.).

II.

Neither deceased, nor the defective coal car with which he negligently collided, was engaged in interstate commerce at the time and place of accident. He was riding on the running board of his regular switch

engine, which was in good condition (P. R., p. 37). He had been in the south yard distributing loaded freight cars on the team track, where they were to be unloaded. Deceased, with his crew and the switch engine, started **north** to distribute the cars which had just arrived on an incoming freight train (P. R., pp. 31-33). Douglass and Daniels, members of deceased's switch crew, were standing on the running board of said locomotive with him and they were all occupying the positions expected of them under such circumstances (P. R., p. 31). **Their** locomotive was lighted (P. R., p. 33), and the **locomotive of incoming freight train** approaching from the north was **brilliantly lighted,** and blinded those upon the running board so they could not see the coal car standing on main track without a coupler upon south end of same, **until** they got within **50 to 60 feet of said car,** when **deceased** was the first to discover it, and **exclaimed,** "There is a car" (P. R., pp. 33-40), or "Look out; there is a car" (P. R., p. 69). Douglass immediately gave a signal to the engineer of his locomotive, and Daniel and Douglass stepped off the running board in safety. The locomotive was only traveling 6 or 7 miles per hour, and after **deceased saw the car,** and **warned** the others of its **presence,** he had **40 to 50 feet** left before colliding with the coal car, in which he could have stepped off the running board to a place of safety, as did Daniels and Douglass (P. R., pp. 35, 40, 72). Daniels saw the coupler of coal car was gone and stepped off to avoid a collision (P. R., p. 40). Deceased had ample time to leave his locomotive, after seeing the coal car, but made no effort to do so. The coal car had only been on the main track about **five minutes** before the accident (P. R., p. 83), and was left there temporarily until

the other bad-order cars were removed, so that it could be placed on the proper track to be repaired (P. R., p. 76). Neither deceased nor his crew were intending or expected to couple to the coal car or to have anything whatever to do with it. They were not intending to couple to **any** car until they reached the incoming freight train after it pulled in (P. R., pp. 41-70). The coal car contained the usual **pasteboard tag**, designating it as a **bad-order car** (P. R., pp. 40-41). The coal car was standing **still** upon the main track and was not engaged in commerce at time of accident. It was simply left there in the ordinary course of business, for a new minutes, until **other bad-order cars** were removed so that the coal car could be placed upon the proper track for repairs. Rule 93 of the company authorized the placing of the coal car on **main** track at that time for above purpose (P. R., pp. 82-83). Deceased was simply upon the footboard for the purpose of riding from one point in the yard to another. He was neither required nor expected to couple **any** car, at that time, much less the coal car (P. R., p. 42). **In short, deceased was simply riding through the yard at time of accident without intending to handle or couple the coal car with which he collided. He** was not, therefore, **engaged** at **that** time in **interstate commerce**, and his death could not confer upon plaintiff a right of action under the Federal Employer's Liability Act of 1908, or as amended in 1910. The coal car had been **removed** from commerce; was **temporarily** put upon the main track so that it could be placed on the **proper** track for repairs, and was **not** in motion at time of accident. The defendant was strictly complying with the law in respect to having said car repaired in the **ordinary** and **usual** course of business, by having the

coal car on its main track for a few minutes until it could be removed to proper track for repair. No one sustained any injury from attempting to **handle** or **couple** said car. We therefore insist that the **coal car** was **not** engaged in interstate commerce at time of accident and that no recovery can be legally sustained herein under the safety appliance laws of Congress. In view of instructions 1 and 9 (P. R., pp. 92-93-94), given by the trial court, and upon which the case was tried, we ask that the cause be reversed and dismissed. (See defendant's instruction "C", P. R., p. 89, and instruction 3, P. R., p. 89.)

Assignment of Erros No. 2, P. R., p. 106.

AUTHORITIES.

Illinois Central R. Co. v. Behrens, 233 U. S. 473 (La.);
N. C. R. Co. v. Zachary, 232 U. S. 248;
Delk v. St. L., I. M. & S. Ry. Co., 220 U. S. 580-585;
Erie Ry. Co. v. *U. S.*, 197 Fed. 287 (116 C. C. A. 649);
U. S. v. *Erie Ry. Co.*, 212 Fed. 853-855;
So. Ry. Co. v. Snyder, 187 Fed. 492-497 (Tenn.);
Siegel v. N. Y., C. & H. R. R. Co., 178 Fed. 873;
U. S. v. Rio Grande & W. Ry. Co., 174 Fed. 399;
C. & N. W. R. Co. v. U. S., 168 Fed. 236;
U. S. v. L. & N. R. Co., 156 Fed. 195;
Taylor v. B. & M. R. R. Co., 188 Mass. 390-392.

The trial court, by instructions 1 and 9 (P. R., pp. 92-3-4) disclose on their face that plaintiff was entitled to recover if the placing of the defective coal car was the proximate cause of deceased's injuries, although the coal car might have been handled with the highest degree of care at time and place of accident. Said instruction 9 is as follows:

9.

"The only assignment of negligence in the complaint is the use of the coal car at the time of the injury without the safety appliances required by Act of Congress, and no other acts or omissions of the defendant's servants can be made the foundation of liability in this cause."

Section 4 of the Safety Appliance Act, as amended in 1910 (36 Statute at Large, p. 298, Chap. 160), while relieving the railway company from the payment of a penalty for moving the defective car under certain conditions, reads as follows:

"And **such** movement or hauling of **such** car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe by **reason of or in connection with the movement** or **hauling** of such car with equipment which is **defective** or **insecure** or which is not maintained in accordance with the requirements of this Act and the other acts herein referred to" * * *.

We insist that a careful consideration of the whole of said section four (4) leads to the inevitable conclusion that Congress was simply undertaking to hold the carrier responsible for any damages which might be sustained by an employe on account of the defective condition of said car while being **transferred** for the purpose of having same repaired. Conceding that the coal car in question had no coupler, while being hauled to Fort Smith for repairs; and conceding for the purposes of the case that it was still engaged in interstate

commerce until removed from the train which hauled it to said city, yet it had been placed on the storage track with other bad-order cars several days before the accident because the bad-order tracks were then full of bad-order cars, and was being removed to a bad-order track for repairs. It was only on the main track about five minutes before the accident occurred, and the crew in charge of same were expecting to remove it to the proper track for repairs without delay. The rule of the company (93) authorized bad-order cars to be placed on the main track under the circumstances of this case, and deceased, from his long service in said yards, must have been familiar with the manner in which said work was done, for he was on the alert and was the first to discover said car. **He warned** his associates of its **presence,** and must have known that Daniels and Douglass, who were on the board with him, had left it. Neither deceased nor the coal car, under such circumstances, could properly be designated as engaging in interstate commerce at the time and place of accident. In other words, deceased and the coal car, at time of accident, were no more engaged in interstate commerce than they would have been had deceased, with his crew, moved in on the repair track for bad-order cars, and had run into the coal car **there,** while it was being **repaired,** and sustained injuries which culminated in his death.

As said by this Court in Illinois Central Railroad Company v. Behrens, 233 U. S. 473, **the true test is the nature of the work being done at the time of the injury.**

We submit that on the facts disclosed by the record, when considered in the light of foregoing authorities, neither deceased nor the coal car was engaged in

interstate commerce at time and place of accident, and that by reason thereof the case should be reversed and the cause dismissed.

III.

The absence of the coupler was not the proximate cause of the injury. The defective car was left temporarily on the main track in the usual manner until the repaired cars on bad-order track were removed, when it was to be returned to bad-order track for repairs. Deceased had nothing to do with this car. He was the first one of his crew to see it, and called their attention to its presence. The other employes on the running board of locomotive with deceased, saw the car was defective and stepped off to a place of safety. Deceased had ample time to do so, and with full knowledge, that his locomotive would collide with said car, elected to remain thereon and take the chances of injury. His voluntary, independent act in risking his life under such circumstances, without any necessity for so doing, should be taken as the **proximate** cause of his injury, regardless of the defective condition of said car.

This question was properly raised (Instruction 1, refused, P. R., p. 89; also refused instructions 6 and 8, P. R., p. 90). (See Third and Fourth Assignment of Errors, P. R., pp. 106 and 107.)

AUTHORITIES.

Pennell v. Pa. Ry. Co., 231 U. S. 675, 679;
St. L., I. M. & S. Ry. Co. v. *McWhirter*, 229 U. S. 265, 280, 282 (Ky.);

A. T. & S. Fe Ry. Co. v. Calhoun, 213 U. S. 1-4 (Ok.);
Cooley on Torts, pp. 68 to 71, inclusive;
Broom's Legal Maxims, Section 215;
Ray's Negligence of Imposed Duties (Personal), pp. 133-4;
1 White on Personal Injuries, Sections 20 to 39, incl.;
3 Elliott on Railroads (Original Ed.), Sec. 1310;
Beach on Contributory Negligence (2nd Ed.), Sec. 31;
1 Thompson's Commentaries on Law of Negligence (2nd Ed.), Sec. 45;
Webb's Pollock on Torts (Enlarged Am. Ed.), pages 29 *et seq.;*
Shearman & Redfield On Negligence (5th Ed.), Sec. 25 and fol.;
Watson on Damages for Personal Injuries, Secs. 33-35;
Henry v. *St. L., K. C. & N. Ry. Co.*, 76 Mo. 288, 293-4;
Cole v. G. S. & L. Society, 124 Fed. 113 (Utah);
Logan v. Ry. Co., 129 S. W. 575 (Ky.);
Gilbert v. Ry. Co., 128 Fed. 529 (Minn.);
Gill v. Ry. Co., 160 Fed. 260 (Tenn.);
Midland Valley Ry. Co. v. Fulgham, 181 Fed. 91 (Ark.);
Lyddy v. L. & N. Ry. Co., 197 Fed. 524-527 (Tenn.);
C., B. & Q. R. Co. v. Richardson, 202 Fed. 836 (Col.).

A multitude of cases are cited in the foregoing authorities, sustaining the same principles. The defective car was not the proximate cause of decedent's death; in our opinion the plaintiff has no case, and the Court should have so declared as a matter of law.

It is therefore insisted that the cause should be reversed and dismissed.

IV.

Deceased's own negligence, in refusing to leave the running board after he saw the coal car (and warned his associates of its presence), when he had ample time to do so, and avoid injury, should be conclusively held as the real cause of his injury. He acted at his peril in unnecessarily encountering a collision with the stationary car, and his assumed risk of injury under such circumstances, should bar a recovery in this action. Deceased had been acting as switchman in defendant's yards at Fort Smith, Arkansas, for more than two years prior to his injury (P. R., p. 16). Rule 93, of said Company, was in force on day of accident and had been in operation since 1909 (P. R., pp. 82, 83, 85). It reads as follows:

> "Within yard limits the **main** track may be used protecting against **first** class trains. **Second** and **third** class and **extra** trains must move within yard limits prepared to stop **unless** the **main** track is **seen** or **known** to be clear" (P. R., pp. 82, 83, 85).

Deceased, from his long experience in the yard, must have known that bad-order cars were constantly handled in that part of the yard where the accident occurred. He was bound to know that in taking out bad-order cars which had been **repaired** it would be necessary to move some of those on bad-order track to **main** track temporarily which had **not** been **repaired** and which were expected to be returned to proper track for repairs. Deceased, from his long ex-

perience in the switch yard, must have known that when the bad-order tracks were full of bad-order cars, as they were when the coal car reached said city, that the coal car would be placed on the **storage** track—as was done in this case—and that it would remain there until some of the cars had been repaired and moved from bad-order tracks in order that it might be properly placed for repairs. The crew in charge of such work, about **five minutes** before the accident, had moved the coal car, with a number of other bad-order cars, from the **storage** track for the purpose of placing them on the proper track for repairs. On account of the absence of a coupler at one end of the coal car it could not be removed with the string of bad-order cars, but had to be left on the main track a few minutes until the engine crew could come up and couple onto it from the end containing a coupler. The coal car had not been on main track exceeding **five** minutes before the accident. The crew were proceeding without delay to perform this duty when the accident occurred (P. R., pp. 64, 73, 74, 75, 76, 83). Immediately before the accident deceased and two associates were on the running-board of the other switch engine, and without any cars attached thereto, started north on main track, for the purpose of distributing the loaded cars of an incoming freight train to the team tracks, where they were to be unloaded. While the coal car was **stationary** on the main track, under the circumstances aforesaid, and without the coupler on south end of same, the deceased, and crew, while traveling north on the main track, after night, going six or seven miles per hour, with their engine lighted (P. R., p. 33) got within fifty to sixty feet of said coal car, when deceased exclaimed, "There is a car," or "Look

out, there is a car" (P. R., pp. 33, 40, 69). At this time, it is said, the headlight of incoming train was shining in the faces of deceased and his associates, and that was the reason assigned for not seeing the coal car sooner. Now, under Rule 93, *supra*, as **deceased saw** the coal car when **fifty to sixty feet** away, he was required to **stop** unless the main track was **seen** or **known** to be **clear**. **He knew** it was not **clear**, but, on the contrary, was the first to see the car, and gave the warning to his associates. Daniels saw the coupler was gone from coal car and stepped off the running board to avoid the collision. Douglass stepped off also (P. R., pp. 40, 69, 70).

It is uncontradicted that deceased saw the coal car **first**, and hence was looking in that direction. There was no reason why he did not see that the coupler was gone, as he was standing on the footboard with Daniels and Douglass, and had the same opportunity for seeing as they possessed. He had ample time to leave the footboard before the injury. It was his duty to take no chances, and he should have stepped off with his associates. He had no legal right to speculate with death at the expense of the railroad company, and having elected unnecessarily to take chances on the consequences of a collision, he and his legal representative should be held to have assumed all risks of injury occasioned by such rashness. He was the architect of his own misfortune, and lost his life by reason of his own recklessness, and that, too, at a time when neither he nor the coal car was engaged in interstate commerce. We therefore insist the case should be reversed and the cause dismissed. (See Refused Instructions 10, 11, 12 and 14, P. R., p. 91; and instructions

7 and 8, given over objection of defendant, P. R., pp. 93-94).

Fourth Assignment of Errors, P. R., p. 107.

AUTHORITIES.

Chesapeake & O. R. Co. v. Hennessey, 96 Fed. 713 (Ky.);
Erie Ry. Co. v. Kane, 118 Fed. 223 (Ohio);
Riley v. L. & N. R. Co., 133 Fed. 904 (Tenn.);
Suttle v. Choctaw, O. & G. R. Co., 144 Fed. 668 (Ark.);
St. L. & S. F. R. Co. v. Dewees, 153 Fed. 56 (Kan.);
C., R. I. & P. Ry. Co. v. Shipp, 174 Fed. 353-4 (Ark.);
C., R. I. & P. Ry. Co. v. Jackson, 178 Fed. 832-835;
Illinois Cen. R. Co. v. Hart, 176 Fed. 245-247 (100 C. C. A. 49);
Gibson v. C. & O. R. Co., 215 Fed. 27, *l. c.*;
Schweig & C., M. & St. P. Ry. Co., 216 Fed. 750 (Minn.);
Butler v. Frazee, 211 U. S. 459-465;
Texas & Pacific R. Co. v. Bourman, 212 U. S. 536-541;
Seaboard Air Line Railway v. *Horton*, 233 U. S. 492 (N. C.);
Southern Ry. Co. v. Crockett, 234 U. S. 725;
Illinois Cen. R. Co. v. *Behrens*, 233 U. S. 473 (La.);
Jackson v. *Mo. Pac. Ry. Co.*, 104 Mo. 448;
Int. & Gt. N. Ry. Co. v. *Story*, 62 S. W. 130 (Tex.).

(*a*) On the facts disclosed by the record, deceased and the members of both switch crews were fellow-servants at time and place of accident. If the crew

which placed the coal car temporarily on the main track were guilty of any negligence in so doing (which we deny) it could not create a liability in behalf of this plaintiff.

Illinois Cen. R. Co. v. Behrens, 233 U. S. 473 (La.);
Bentler v. Grand Trunk Ry. Co., 224 U. S. 85;
Allen v. N. Y., N. H. & H. R. Co., 174 Fed. 779 (Mass.);
Assignment of Errors 4 and 10, P. R. 107 and 108.

(*b*) Deceased knew the coal car, under rule 93, *supra*, was entitled to be on the main track, as a bad-order car, and it was his duty to step off the running board and take no chances, as he saw the coal car in time to have gotten off in safety. He had two courses open to him. One was perfectly safe, and the other meant collision, with unknown consequence. Instead of taking the safe course selected by his associates, he unnecessarily and recklessly selected and followed the dangerous course, and lost his life as the result thereof. Under such circumstances the defendant company ought not to be held responsible for his death.

Smith v. F. N. Box Co., 193 Mo. 716;
Moore v. Ry. Co., 146 Mo. 572-582, *l. c.*;
Hirsch v. F. B. Bread Co., 150 Mo. App. 162-174, *l. c.*

V.

The administratrix, who was the wife of deceased, was allowed to testify over objection as to her competency, to transactions with deceased; the amount of contributions made by him to her at various times, etc., which was all of the testimony upon that subject.

Testimony of Mrs. Conarty, P. R. 51-54-63. Fifth assignment of errors, P. R. 107.

AUTHORITIES.

Park, Admrx., v. Admrx, 48 Ark. 133;
Rainwater v. Harris, 51 Ark. 401;
Nunely v. Becker, 52 Ark. 520;
Cash v. Kirkham, 67 Ark. 318;
Wilson v. Edwards, 79 Ark. 69;
Jarvis v. Andrews, 80 Ark. 277;
Williams v. Waldon, 82 Ark. 138;
Rush v. Prescott and N. W. Ry. Co., 83 Ark. 210;
Mutual Life Ins. Co. v. Watson, 30 Fed. 653;
DeBeaumont v. Webster, 71 Fed. 226;
Morris v. Norton, 75 Fed. 912;
Morris v. Norton, 81 Fed. 535;
DeRoux v. Girard, Executor, 112 Fed. 89;
Page v. Burnstine, 102 U. S. 664;
Whitney v. Fox, 166 U. S. 637;
Luken v. Lakeshore & M. S. Ry., 248 Ill. 377.

VI.

The Court erred in permitting W. J. Daniels and F. T. Woolum, witnesses for plaintiff, to testify as to the effect of a collision with a car standing on the main track if the automatic coupler had been in perfect condition; and as to what effect it would have upon a switchman standing on the footboard if such collision should occur. Neither of these witnesses was shown to be an expert, and even if they had qualified as such, the answers sought to be elicited were not the subject of expert testimony. The jurors were just as competent to pass upon these questions as the witnesses.

Gutridge v. Mo. Pac. Ry. Co., 94 Mo. 468, 472-3.

(*a*) If **deceased** and the **coal car** were engaged in **interstate commerce** at the time of accident, then the Employers' Liability Act and Safety Appliance

Acts would apply, on account of the use of said car without a coupler.

It is manifest that plaintiff's counsel was not satisfied that the facts brought the case within the safety appliance law, and hence was attempting to bolster up the case by endeavoring to show **common-law negligence.** The trial court, however, in the giving of instruction nine (9) (P. R., p. 93), told the jury in legal effect that the only negligence assigned was in regard to the use of the coal car, at time of injury, without safety appliances as required by Act of Congress, "and no other acts or omissions of defendant's servants can be made the foundation of liability in this cause". As there was no dispute about the coal car being without a coupler at the end of same where the collision occurred, what office could the testimony of above witnesses fill in the trial, except to confuse and mislead the jury? (See P. R., pp. 37-43, 44.)

Sixth Assignment of Errors, P. R., p. 107.

VII.

Motion to Compel Plaintiff to Elect.

The Court committed error, at the conclusion of all the testimony, in overruling the following motion of defendant:

> "The defendant, not waiving its right under its demurrer and protesting against being required to answer further, moves the Court to require the plaintiff to elect whether or not she will prosecute her cause of action as administratrix for compensation for the next of kin or whether or not she will prosecute the cause of action for the pain and suffering endured by W. G. Conarty on account of the injuries alleged."

The complaint, in dealing with the subject of damages (P. R., pp. 3 and 4) was as follows:

> "And plaintiff says that by reason of said intestate being so caught between said locomotive and said coal car, he was caused to be greatly and painfully bruised, mashed and crushed about his head, arms, chest, legs and face, his muscles and nerves to be greatly and painfully torn, bruised and lacerated, the bones in and about his face, head, body and limbs to be crushed and broken so as to cause and ultimately bring about his death. Plaintiff says that her said intestate, by reason of said injuries so received, was caused and compelled to take his bed on the said 13th day of November, 1910, and there lie and languish in great mental and physical pain until the 19th day of November, 1910, on which last-named date her said intestate died from said injuries and wounds so inflicted upon him as aforesaid. That from the said 13th day of November, 1910, until the said 19th day of November, 1910, her said intestate consciously and knowingly suffered great mental and physical pain, and realized that death was impending and would ultimately result from said injuries, all of which plaintiff says was and is to the great damage of plaintiff, said intestate's widow and children, in the sum of one hundred thousand ($100,000.00) dollars."

The trial court, over the objections of defendant, permitted the plaintiff, who was the widow of deceased, to testify as to his earnings during the last year of his life (P. R., pp. 51, 52, 54, 63).

Damages.

The Court, over objection of defendant, gave to the jury the following instructions (P. R., p. 92):

3.

"If you find for the plaintiff you will assess her recovery at such a sum as, from the evidence, will fairly compensate the widow and children for the pecuniary loss, if any, which they have sustained by reason of the death of Conarty; and in this may be included the value of the paternal care and instruction, if any, which the minor children may have lost by reason of the death of Conarty.

4.

"You will also, if you find for plaintiff, state and find such an amount as, in your judgment from the evidence, will be a fair compensation for the conscious pain and suffering, if any, which Conarty endured after the injury and as a consequence thereof prior to his death."

Employers' Liability Act of 1908 (35 U. S. Stat. at L. 65, C. 149):

"Section 1. That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and if none, then of such employe's parents; then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the offi-

cers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Employers' Liability Act, as amended in 1910 (36 U. S. Stat. at L. Ch. 143; L. 291):

> "Section 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representatives for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, **but in such cases there shall be only one recovery for the same injury.**"

It is generally conceded that Section 9, *supra*, was brought about by the discussions of the different Courts in Fulgham v. Midland Valley R. Co., 167 Fed. 660; Walsh v. Railroad Co., 173 Fed. 494, and perhaps other later cases.

In Thornton's Federal Employers' Liability and Safety Appliance Acts (2nd Ed.), Section 104, it is said:

> "Before the amendment of 1910, the cause of action given the injured employe did not survive his death, but died with him. Consequently, if the injured person died after bringing suit to recover damages for his injuries, his personal representative could not be substituted and prosecute the suit for the benefit of the heirs or widow of the deceased; but he must bring a new action for that purpose. But Congress remedied this defect by amending Section 9 of the Act, * * * The cause of action mentioned in this section as

amended, is the right to maintain a suit to recover damages given by the statute to the injured employe, and is not the cause of action given the widow and children, and the other persons named, to recover damages for their support. If the death of the employe be instantaneous on receiving his injury, then there is no cause of action to survivor, and the amendment quoted above does not apply.

"Under the Federal Statute the administrator has his option, when the deceased has brought an action during his lifetime to recover damages, to either prosecute that action or dismiss it and bring his own action; **but he cannot wage both causes of action, he must take his choice.**"

Construction of Section 9.

We are of the opinion that Congress, in the enactment of this section, intended that the legal representative of an employe, killed while engaged in interstate commerce, by reason of the violation of Employers' Liability Act, or Safety Appliance Act, might have the option—if deceased was not instantly killed—to sue for the damages which the deceased might have recovered on account of his injuries had he lived, or for the pecuniary loss sustained by his beneficiaries under said Acts, on account of his wrongful death.

The Federal law has conferred upon the legal representative of deceased **two separate** and independent rights of action, under the circumstances aforesaid, and each is based upon the same negligent acts complained of. The administrator may be in doubt as to which right of action might be the most beneficial to those whom he represents. Under such circumstances, in some jurisdictions, he would be permitted to plead

in his complaint, **both** causes of action, stated respectively in **separate counts**, with the appropriate relief prayed for in each count; and after the evidence is in he may **voluntarily elect** as to which cause he will maintain, and dismiss the other. With the evidence in, the Court should **require** the plaintiff to elect on which cause of action he will proceed and to dismiss the other, if he fails to make the election. Hence, said section concludes, "**but in such cases there shall be only one recovery for the same injury**".

The legal representative is not bound to pursue **both** rights of action, but may pursue either. He cannot, however, sue upon one cause of action, and by his proof increase the measure of recovery, by the introduction of testimony that belongs to the other cause of action. Neither can the plaintiff legally, by instructions, empower the jury to consider as elements of damages those things that do not belong to the count as pleaded. In the case at bar the plaintiff, in her complaint, has but a **single** count, and that is based upon Section 9, *supra*, which measured her recovery by those elements of damages alone, which the deceased could have presented had he survived (P. R., pp. 3 and 4). Over the objection of defendant, plaintiff was permitted to testify as a witness, in order to show the pecuniary loss sustained, although there was only one count pleaded, and no such issue was even intimated in said count (P. R., pp. 51, 54, 63).

Defendant, in express terms, attempted to have plaintiff **elect** whether she would proceed upon her cause of action **as pleaded**, or for the pecuniary loss sustained by reason of her husband's death (P. R., p. 88). Instead of sustaining defendant's motion the trial court, over objection of defendant, gave instruction

numbered 3 (P. R., p. 92). In other words, the jury were turned loose without either rudder or compass, and given a roving commission to fix their own standard as to what ought to be considered, regardless of the issues presented by the complaint.

Assignment of Errors No. 7 (*P. R., p.* 107).

AUTHORITIES.

Strode v. *St. L. Transit Co.*, 197 Mo. 616, and cases cited;

Legg v. *Britton*, 64 Vermont 652;

3 *Elliott on Railroads*, Section 1375, and cases cited;

Thornton on Federal Employers' Liability and Safety Appliance Acts (2nd Ed.), Sec. 104;

Hendrix v. Am. Express Co., 138 Ky. 704-709, *l. c.*;

McCafferty v. Pa. Ry. Co., 193 Pa. St. 339;

Edwards v. Gimbel, 202 Pa. St. 30;

Hartigan v. So. Pac. Ry. Co., 86 Cal. 142;

Munro v. Dredging, Etc., Co., 84 Cal. 515;

Daubert v. Western Meat Co., 139 Cal. 480;

Andrews v. Hartford, Etc., Ry. Co., 34 Conn. 57;

Littlewood v. Mayor, Etc., N. Y., 89 N. Y. 24;

Fulgham v. Midland Valley Ry. Co., 167 Fed. 660;

Walsh v. Ry. Co., 173 Fed. 494;

Garrett v. Ry. Co., 197 Fed. 715;

Fithian v. Railroad Co., 188 Fed. 842;

American R. Co. v. Berch, 224 U. S. 547;

Michigan Central R. Co. v. Vreeland, 227 U. S. 59;

St. L., I. M. & So. Ry. Co. v. Hesterly, 228 U. S. 702;

Gulf, Col. & S. Ry. Co. v. McGinnis, 228 U. S. 173;

Cooley on Torts (2nd Ed.), p. 309;

Shearman & Redfield on Law of Negligence (5th Ed.), Sec. 140;
Casey v. Transit Co., 205 Mo. 721-**724**, *l. c.*

VIII.

The Court erred in giving to the jury instruction No. 1 (P. R., p. 92) over the objection of defendant. See peremptory instructions "A", "B", "C", P. R., p. 89, and instructions 1, 2, 3, 4, 6, 8, 9, 11 and 12 refused (P. R., pp. 89, 90, 91).

Assignment of Errors, numbered 8 and 10 (P. R., pp. 107, 108).

BRIEF AND ARGUMENT.

A car, loaded with coal, was consigned from Huntington, Arkansas, to a point in Texas. It reached Jenson, Arkansas, in a badly damaged condition that called for heavy repairs, which could only be made at Fort Smith, Arkansas. On the 9th of November, 1910, it was taken from Jenson to Fort Smith, fourteen miles off its course. After being repaired it would be necessary to transport it back over the same line before it resumed its journey. There were three tracks at Fort Smith on which repairs were made. When these were full, it was necessary to store the damaged cars on a storage track. Track No. 2 was used for this purpose. When the whole of this track was not needed for storage, one end of it was used for other purposes, but the damaged cars were never stored with or mingled with other cars. When this car reached Fort Smith the repair tracks were full, and it was stored with damaged cars on this storage track. Four days later, on the night of November 13th, 1910, the crew whose duty it was to handle damaged cars and those that had been repaired, took all of the cars that had been **repaired** from the repair tracks and placed them in their proper places. After having done so, they went to the end of this storage track, coupled on a line of thirteen or fourteen **damaged cars**, pulled them out on the main track, shoved them down to a point necessary in order to make a drop switch to throw these cars in on the repair track, which was the usual, customary and only way of handling cars of this character. The

car in question was on the south or west end of the string; the south or west end of this car being badly damaged, could not be coupled to from that end; hence it was necessary that this car should be left on the main line until the other cars were taken in and placed on the repair track, which consumed three or four minutes. After having distributed the other cars, it was the purpose of this crew to return, couple to the **undamaged** end of this car, take it singly on to another repair track and leave it. While this crew was thus engaged another crew that had been switching in another part of the yard came up the line for the purpose of breaking up and switching a freight train that had just arrived. Deceased and two other members of the switching crew were standing on the footboard on the rear end of the engine; the engine at the time was backing; the electric headlight of the freight train that had just arrived blinded the crew to such an extent that they did not discover the coal car standing on the main line as soon as they would have done but for this headlight; **when the coal car was discovered by deceased, he gave the alarm**; his two companions stepped from the footboard before the engine had moved more than ten or twelve feet, and he remained on the footboard until the engine ran a distance of some fifty feet further, where it collided with the coal car. The injuries received from the collision with the coal car caused his suffering and death. Deceased's switching crew had nothing whatever to do with handling this car and it was not their purpose to couple to it.

I.

(See specification I, p. 63 of this brief.)

A petition and bond to transfer to the Federal Court, in proper form, on account of diverse citizenship, were filed in due time, the bond being approved, but the Court declined to transfer on account of the Act forbidding a transfer in this class of cases.

The Employers' Liability Act, as amended on April 5th, 1910, says:

> "Under this Act, an action may be brought in a Circuit Court of the United States in the district of the residence of the defendant in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States, under this Act, shall be concurrent with that of the courts of the several states, and no case arising under this Act and brought in any state court of competent jurisdiction, shall be removed to a court of the United States."

(*a*) Does not Congress mean by this Act that no transfer of a cause shall be made **solely** on account of a **federal** question being involved, the cause of action being created by **federal** statute and therefore calling for the construction of an act of Congress? This construction should be placed upon this Act, rather than to say that the citizen should be deprived of a constitutional right to remove a cause of action brought by a citizen in a court of his own state against a non-resident. To give it any other construction would be to say that if a showing should be made under the federal statute, that there was local influence or prejudice which would deprive the non-resident of a fair

trial, or if a showing should be made that there was a denial of civil rights under the United States statute, then no removal could be had.

In the case of Van Brimmer v. Texas & P. Ry. Co., 190 Fed. 394-399, it was said:

> "The purposes intended to be accomplished by this legislation are too patent to need mention, and yet if the amendment of April 5, 1910, be given the construction urged in argument by the plaintiff, even in this class of cases the right of removal would be taken away where the cause of action arose under the Employers' Liability Act. It is not conceivable that Congress intended to confer any such exceptional privilege upon the one class of citizens mentioned in that Act to the exclusion of all other citizens."

Held that there was no intention on the part of Congress to destroy the right of removal which a defendant might have by virtue of some other provision of law.

1. If a law is susceptible of two constructions, one of which renders it unconstitutional and the other valid, the latter construction will be adopted and the law upheld.

Darlington Lumber Co. v. Mo. Pac. Ry. Co., 216 Mo. 658-672, 3 *l. c.*;

Lewis' Sutherland on Statutory Construction, Sec. 516;

Swift v. Topeka, 43 Kan. 671, and cases cited.

(*b*) Has Congress the right to deprive a non-resident of the right of removal where the conditions under the Constitution exist and the procedure for transfer has already been enacted by Congress by making an excep-

tion of this kind? The Constitution of the United States provides that:

> "The judicial powers of the United States shall be vested in the Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. * * *
>
> "The judicial power shall extend to all cases in law or in equity * * * between citizens of different states" (Art. III, Secs. 1-3).

In the celebrated case of Sharon v. Terry, 36 Fed. 337-355, Mr. Justice Field, with whom Justice Sawyer and Justice Sabin were associated, made use of the following language:

> "The Constitution declares that the judicial powers of the United States shall extend to controversies between citizens of different states, a provision which had its origin in the impression that local attachments and prejudices might injuriously affect the administration of justice in the State Courts against the claims of citizens of other states (Ry. v. Wheaten, 13 Wallace 270-289). So valuable has the right of citizens of other states than the one in which suits are brought against them to have their cases heard in a Federal Court always been regarded that, at the very outset of the government, Congress provided, and in different acts since has renewed the provision, that when a citizen of another state is sued in the state court he may, upon proper application accompanied by an offer of good and sufficient surety for entering copies of the proceedings and his appearance in the Federal Court, have the case removed to that court and tried or heard there, and all of the acts of Congress have declared that it shall be the duty

of the State Court in such a case to accept the surety and to proceed no further in the case."

In Gavin v. Vance, 33 Fed. 84-85, the Court uses this language:

"Here there is a manifest intention to afford such protection as is assumed to be found in the federal jurisdiction to every non-resident defendant sued by his adversary in the home courts of that adversary against any possible partiality in those courts."

The Supreme Court of the United States, in the case of Martin v. Hunter, 1 Wheaton 304-327, in commenting on the provisions of the Constitution giving the right of citizens of different states to transfer causes of action and giving the Federal Courts jurisdictions thereof, say that it is the voice of the whole American people, solemnly declared, in establishing one great department of that government which was, in many respects, national, and acts upon the individual as well as the state; **that the language of the article throughout is manifestly designed to be mandatory upon the Legislature.** Its obligatory force is so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation.

The Court said:

"If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the

jurisdiction as to all; for the Constitution has not singled out any class on which Congress are bound to act in preference to others.

"Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself. * * * The words, 'judicial power shall extend,' **are used in an imperative sense and import an absolute grant of judicial power.**"

The Court's attention is respectfully called to the extensive reasoning in this case.

It is very clear that Congress had no power whatever to confer jurisdiction upon the State Court. The State Courts may enforce a right created by federal statute, but this is entirely discretionary, and Congress can impose no duty on the State Court to take jurisdiction of causes of action created by it.

In re Woodbury *et al.*, 98 Fed. 833-837;
Robertson v. Baldwin, 165 U. S. 275-279;
Freedman v. Bingham, 3 Clifford 552-560.

According to the Act in question the plaintiff has his election to either sue in the Federal Court or in the State Court. If a suit is brought in the State Court, the defendant is absolutely helpless and compelled to submit to a prejudiced tribunal. This cannot be corrected on appeal. The constitutional right conferred upon him to have his case tried in the Federal Court is denied him, while the election is given to the plaintiff.

"But, if the position of the plaintiffs be correct, and defendant, however strong his convictions, however conclusive his case, however clear his rights, must stand mute before the federal tribunal whose aid he seeks, and must be remanded

to the encounter of these attachments, prejudices, jealousies and interests dependent upon the want of skill of the courts of his adversary."

State v. Coosaw Min. Co., 45 Fed. 804-810.

But in this case we have a provision **giving the Federal Court jurisdiction, at the election of the plaintiff,** and by **an exception attempting to deprive the defendant of the right to remove the case to the Federal Court** on grounds given by the Constitution. This **exception** is clearly void, and the law authorizing a removal on account of diverse citizenship still remains; and this restriction is clearly unconstitutional, in any case where the transfer is sought upon the ground of diverse citizenship.

"In so far as this law is restrictive of the constitutional right of a non-resident, it is, in my judgment, unconstitutional. If Congress can impose this restriction, they may go further and impose other restrictions as their discretion may dictate. In this way a constitutional right may be modified or taken away in whole or in part, as Congress may determine, which is a new and most dangerous principle and cannot be maintained."

The above language was used in the case of Dundas v. Bowler, 3 McLean 204, federal cases No. 4140, with reference to an Act which attempted to prevent a removal by an assignee of commercial paper unless the assignor was also a non-resident.

"The Constitution declares that the judicial power of the United States shall extend to 'controversies between citizens of different states' as well as to cases arising under the Constitution, treaties and laws of the United States; but the conditions

upon which the powers shall be exercised, **except** so far as the original or appellate character of the jurisdiction **is designated in the Constitution**, are matters of legislative discretion."

Gains v. Fuentes *et al.*, 92 U. S. 10-17.

"A state cannot tie up a citizen of another state having property rights within its territory invaded by unauthorized acts of its own officers to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of a state to protect property rights, a citizen of another state may invoke the jurisdiction of the Appellate Courts."

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362-391.

If a state cannot tie up a non-resident in its courts and deprive him of his rights to litigate in the Federal Court, can Congress confer jurisdiction on this particular court in this particular class of cases for the plaintiff and deprive the defendant of his constitutional right to have a trial by an impartial court and jury by an exception in the statute?

In view of the constitutional provision aforesaid, as well as upon principle, the right of transfer, based upon diverse citizenship, should not be denied the plaintiff in error in this cause.

II.

(See specification II, p. 63 of this brief.)

The car in question was not being used in interstate commerce at the time of the accident. According to the undisputed evidence, and the agreed state of facts, the car, while moving from Huntington, Ark., to Texas, in some unexplained way had been damaged to such

an extent that it had to be brought fourteen miles off its course for heavy repairs to be made, after which it would be necessary to transport it back over the same line fourteen miles to Jenson before it resumed its interstate journey. It had been marked "Bad Order" and had been placed upon the storage track with other damaged cars. It was in no way mingled with other cars that were used in traffic; after remaining on this storage track three days, when the repair tracks had been cleared, the crew whose duty it was to refill these repair tracks with damaged cars took this car in the usual manner, which was a careful and prudent manner, and moved up the main track a sufficient distance from the spur leading to the repair track to enable the crew to make a drop switch and place the other twelve cars upon one of these repair tracks. After these cars had been placed the engine and crew handling them returned to the main track for the purpose of taking this other damaged car and placing it upon another repair track. While this work was in progress and before the engine had reached this car, an engine, operated by another crew not intending to handle this car, collided with it, causing the injuries for which suit has been brought.

> "But the loss of its couplers having practically disabled it and put it out of commission, and the car, after that, being shifted solely for the purpose of getting it out from the midst of others and putting it in the way of being taken care of, from the moment that this was recognized and acted upon, it lost any interstate character which it may have had before, and ceased to be hauled or used in moving interstate traffic so as to make the com-

pany liable for injuries received because of its defective condition."

Siegel v. N. Y. C. & H. R. R. R. Co., 178 Fed. 873-876.

The Act in question includes, first, vehicles actually moving interstate traffic. Second, such vehicles, though empty, moving to receive such traffic or "otherwise commercially used by the carrier." Third, vehicles used in connection with vehicles embraced in either of the two former classes.

"The only practical method of railroading requires that such vehicles when out of repair shall be taken to the shops, and if they are wholly excluded from commercial use themselves and from other vehicles which are commercially employed, they do not fall within any of the classes covered by the Safety Appliance Acts."

Chicago & N. W. Ry. v. U. S. (Eighth Cir. Ct. of Appeals), 168 Fed. 236-237-238;
U. S. v. L. & N. R. Co., 156 Fed. 195.

"But we think that, notwithstanding the defendant did not seasonably repair the defect in the car, the latter was not subject to the Act while actually withdrawn from commercial use and from connection with vehicles in commercial use—for example, while being hauled to Lenoir in a purely intrastate train composed only of cars carried for the purpose of repair, **or while retained on a repair track** out of all connection with the vehicles in commercial use."

Southern Ry. Co. v. Snyder, 187 Fed. 492-497 (Eighth Cir. Ct. of Appeals).

When the car was badly damaged "it then became the duty of the Railroad Company to withdraw the car

from use and have it repaired to conform with the law before using it further."

Delk v. St. L. & S. F. R. R. Co., 220 U. S. 580-585.

If this car had not been "withdrawn from use", then it would be difficult to say when a car had been so withdrawn. **"It was not being used,** within the meaning of the statute."

Taylor v. B. & Me. R. R. Co., 188 Mass. 390-392, 74 N. E. 591;
U. S. v. Rio Grande & W. Ry., 174 Fed. 399.

We desire to call special attention to following recent cases in respect to this subject:

Illinois Cen. R. Co. v. *Behrens*, 233 U. S. 473 (La.);
N. C. R. Co. v. *Zachary*, 232 U. S. 248;
Erie Ry. Co. v. *U. S.*, 197 Fed. 287 (116 C. C. A. 49);
U. S. v. *Erie Ry. Co.*, 212 Fed. 853-855.

III.

(See Specification III, p. 69 of this brief.)

The only ground alleged in the complaint on which a recovery is based is, that the defendant permitted a car with a defective coupler to **"be hauled and used."** This was not the proximate cause of the injury. The engine upon which deceased was riding had been engaged in placing and shifting cars on the team track. Having completed this, it started up the main line; the incoming freight train having an electric headlight blinded the parties in charge of the engine so they failed to discover the car in question which had been left temporarily upon the main line while being removed from the storage track to the repair track. De-

ceased was the first to discover the car and notified his companions on the footboard; they stepped off before the engine had moved more than ten or twelve feet. Deceased voluntarily remained upon the footboard, notwithstanding the speed was being checked, until the engine moved some fifty or sixty feet, after the other parties had stepped off, to the point of collision. It had moved the entire length of the engine and tender from where the parties stepped off. The engine was not intending to couple to this car and this crew had nothing whatever to do with handling it. It was simply a **collision** in no way attributable to the want of automatic couplers or any negligent act of the company. This crew was protected by a rule of the company which had been placed in the hands of each one, that they should expect to find these cars upon the main track. By the rule and the course of business which was well known to deceased and all of the other switchmen, the other crew had a right to leave this car on the main line, and, in fact, this was the only way that it could be handled. The law requiring automatic couplers imposes on the employe the co-relative duty of **refraining from going between the ends of the cars when no duty requires it.**

Gilbert v. Burlington, C., R. I. & N. Ry. Co., 128 Fed. 529.

One who goes between cars with defective drawbar and stumbles, the stumbling is the proximate cause and not the defective drawbar.

Cincinnati & N. O. T. R. Co. v. Mealer, 50 Fed. 725;

See also William v. Central R. R. of Iowa, 43 Iowa 396;

Pryor v. L. & N. R. Co., 90 Ala. 32;

St. L. & I. M. R. R. v. McWhirter, 229 U. S. 265-280-282;
C., M. & St. P. R. R. v. Elliott, 55 Fed. 949;
Berlin Mills v. Croteau, 88 Fed. 860;
Kreigh v. Westinghouse, 152 Fed. 120;
Amer. Bridge Co. v. Seeds, 144 Fed. 605;
Gill v. L. & N. R. R., 160 Fed. 260;
Railway v. Ross, 56 Ark., 271-275;
Ultima, Thule & M. R. R. v. Benton, 86 Ark. 289;
St. L., K. & S. W. R. v. Fultz, 91 Ark. 260;
See Federal Employers' Liability and Safety Appliance Acts, Second Edition by Thornton, Sec. 95.

The purpose of the Act was to avoid the "necessity of going between the cars." The risk in **"coupling and uncoupling"** was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically.

Johnson v. Southern P. Ry., 196 U. S. 15-19.

The statute does not regard the **strength** of the coupling, but its safety in **making couplings.**

Pennell v. Pa. Ry., 231 U. S. 675-679.

To constitute proximate cause the statute must have been violated, and from the act in violation of the statute the result should have been foreseen.

A. T. & S. F. Ry. v. Calhoun, 213 U. S. 1.

Several new and independent causes intervened between the placing of the car by the outside train crew for repairs and the injury to deceased. First, Conarty and his switching crew failed to observe Rule 93. Second, the engine on which Conarty was riding never

would have touched the car but for all parties being blinded by the headlight of another engine. Third, the other members of his switch crew stepped off the footboard while Conarty saw proper to remain. Fourth, the absence or presence of an automatic coupler was a mere **incident** that **might** have **contributed** to his death, **or,** under other circumstances, might have **saved** his life—hence, the absence of the coupler was not the proximate cause.

C., B. & Q. Ry. v. Richardson, 202 Fed. 836-840.

If he remained on the footboard from choice, then his choice was the proximate cause and not the collision.

The Briton, 50 Fed. 581.

"Despite the presence of the defective cars, to charge the defendant with the responsibility of Lyddy's act is to ignore plain and familiar rules of proximate and remote cause."

Lyddy v. L. & N. Ry., 197 Fed. 524-527.

"The purpose of the Safety Appliance Act was to require all cars, regularly used on any railroad engaged in interstate commerce and all other cars used in connection therewith, to couple automatically by impact and to be coupled and uncoupled **without the necessity of men going between them,** whether they are loaded or empty, and although not actually engaged in such commerce at the time. * * * The design of the Act was, therefore, to protect employes from injuries received in going between cars **to couple** or **uncouple** them, **not from injuries received in collisions.**"

Campbell v. Spokane, Etc., Co., 188 Fed. 515-518;

Hohenleitner v. So. Pa. Ry. Co., 177 Fed. 796-798.

The facts being undisputed, the question of proximate cause was for the Court.

Pike v. Ry., 39 Fed. 255;
Ultima, Thule R. R. v. Benton, 86 Ark. 289;
Gilbert v. Burlington, C., R. I. & N. R. Co., 128 Fed. 529.

Neither the Court nor jury could transfer a **remote** cause into the **proximate** cause or to make the injury which was **not** the natural cause of the alleged negligent act the **natural** cause of such act.

Cole v. Gennold, Etc., 124 Fed. 113 (Eighth Cir. Ct. of Appeals).

The presence or absence of the coupler was in no way connected with the duties of deceased, nor the company's duty to him. As well might a section-hand on a hand-car claim that a projecting bolt, where the missing couplers should have been, had injured him in a **collision,** as a switchman on an engine that he was thus injured by a car he was not going to handle, or, if this car had been on the bad-order storage track, or on the repair track, and the employe, being blinded by the headlight, had failed to discover an open switch, and his car had collided with it, as well might he claim that the condition of the coupler was the proximate cause and that the car was "being used in interstate commerce." The death of Conarty was either the result of an accident pure and simple, for which no one was liable, or it was occasioned by his own negligence.

Ultimathule Ry. v. Benton, *supra*;
St. L., K. & S. W. v. Fultz, 91 Ark. 260;
U. S. v. Boyd, 45 Fed. 851;
Midland Valley Ry. v. Fulgham, 181 Fed. 91.

IV.

(See Specification IV, p. 71 of this brief.)

The plaintiff had worked in the yards for a number of years; he was entirely familiar with the rule which required him to anticipate cars being on the main line; he knew that this other crew was handling damaged cars; that it was absolutely necessary to place them on the main line in setting them on the repair track; he knew that they should anticipate that damaged cars might be on the main line, and if he saw proper to remain in the service and ride a distance of fifty or sixty feet after his companions had stepped off, and he would only be required to make one more step than they did—only having to step down some six or eight inches to the ground—he clearly assumed such risk, as the company was not violating the Safety Appliance Law.

Jackson v. Ry. Co., 104 Mo. 448;
C., R. I. & P. Ry. v. Shipp, 174 Fed. 353-354;
Chesapeake & O. Ry. v. Hennesy, 96 Fed. 713;
Jackson v. C., R. I. & P., 178 Fed. 432-435;
Erie Ry. v. Kane, 118 Fed. 223;
Suttle v. Choctaw, O. & G. Ry. Co., 144 Fed. 668;
Riley v. L. & N., 133 Fed. 904;
St. L. & S. F. R. R. Co. v. Dewees, 153 Fed. 56;
Butler v. Frazee, 211 U. S. 459-465.

V.

(See Specification V, p. 75 of this brief.)

The administratrix, who was the wife of deceased, was allowed to testify, over objection as to her competency, to transactions with the deceased, the amount of contributions made by him to her at various times, which was all of the testimony upon that subject.

The plaintiff was the wife of deceased and was beneficially interested in the result of the suit, and was also administratrix; she was allowed to testify while suing as such administratrix as to transactions with deceased—that is, the amount of contributions made by him to her at various times, all of which was incompetent under the Constitution of the State of Arkansas and under the federal law; this was an action in which a judgment would have been in favor of or against her as such administratrix; that being the case, the Constitution of the State of Arkansas, Schedule 2, in explicit terms makes the testimony inadmissible and the witness incompetent to testify. It has been so held uniformly for more than twenty-five years under the laws of the State of Arkansas.

Park, Admr., v. Lock, 48 Ark. 133;
Rainwater v. Harris, 51 Ark. 401;
Nunely v. Becker, 52 Ark. 550;
Cash v. Kirkham, 67 Ark. 318;
Wilson v. Edwards, 79 Ark. 69;
Jarvis v. Andrews, 80 Ark. 277;
Williams v. Waldon, 82 Ark. 138.

It was also held that even if a judgment for costs only could be rendered, she would not be competent to testify.

Bush v. Prescott and M. W. Ry., 83 Ark. 210.

This being a suit based upon a United States statute, the Court should have followed the construction of the United States Courts upon the Act of Congress on this subject, which is the same as the provision in the Constitution of the State of Arkansas, and precluded either party from testifying.

Mutual Life Ins. Co. v. Watson, 30 Fed. 653;

DeBeaumont v. Webster, 71 Fed. 226;
Same, 81 Fed. 535;
Morris v. Norton, 75 Fed. 912;
DeRoux v. Girard, Executor, 112 Fed. 89;
Page v. Burnstine, 102 U. S. 664.

The State Court had no right to abandon the long-established rule on this subject, and the construction of the Federal Courts as to the incompetency of this evidence.

Whitney v. Fox, 166 U. S. 637;
Luken v. Lakeshore & M. S. Ry., 248 Ill. 377, 94 N. E. 175.

VI.

(See Specification VI, p. 76 of this brief.)

The testimony of W. J. Daniels and F. T. Wollum as to the effect of a collision with or without automatic couplers, was entirely incompetent (P. R., pp. 27, 43, 44; sixth assignment of errors, P. R., p. 107).

VII.

(See Specification VII, p. 77 of this brief.)

Prior to the amendment of April 5, 1910, a cause of action for pain and suffering under the Employers' Liability Act, did not survive to the administratrix.

Fulgham v. Midland Valley Ry., 167 Fed. 660;
Walsh v. N. Y. N. H. & H. Ry. Co., 173 Fed. 494;
Garrott v. L. & N. R. Co., 197 Fed. 715;
American Ry. of Porto Rico v. Birch, 224 U. S. 547;
Michigan Central Ry. Co. v. Vreeland, 227 U. S. 59.

No one but the administrator could sue.

Thompson v. Wabash Ry., 184 Fed. 554;
Fithian v. St. L. & S. F. R. R. Co., 188 Fed. 842.

After the ruling in the case of Walsh v. N. Y. N. H. & H. Ry. Co. in October, 1909, *supra*, other decisions to the same effect, the amendment of April 5, 1910, was enacted which made the cause of action for pain and suffering which deceased might have endured, survive to the administratrix for the benefit of the widow and next of kin who were also the beneficiaries under the original act and the administrator was also required to sue for this cause of action when it could be maintained. This amendment provided:

> **"And in such cases, there shall be only one recovery for the same injury."**

Under the original Act the administrator was allowed to recover for the benefit of the widow or next of kin for **pecuniary** loss sustained on account of the loss of contributions to their support.

Swift v. Johnson, 138 Fed. 867;
Garrott v. L. & N. R. Co., 197 Fed. 715;
Kane v. So. Ry. Co., 199 Fed. 211.

The cause of action contemplated by Section 9 of 1910 amendment was given for **pain and suffering** on account of the injury to deceased, the compensation therefor to go to the same parties.

The statute expressly said, in creating this second cause of action:

> **"But in such cases, there shall be only one recovery for THE SAME INJURY."**

Only one cause of action is stated in the **complaint** in this case, and that was for pain and suffering of deceased caused by the injury, for which $100,000 in damages was asked.

The Court, however, over objection of defendant, permitted plaintiff—the widow of deceased—to testify in respect to the pecuniary loss, although no such issue was tendered in complaint, and the Court instructed the jurors that they could allow for pecuniary loss, although there was only **one count** in petition and no issue tendered on this subject.

A motion was made to require the administrator to elect, which was overruled, and exceptions were duly saved. A verdict was returned in gross.

See Conner v. Paul, 12 Bush (Ky.) 144;
L. & N. Ry. v. McElwain, 98 Ky. 700;
Hendricks v. Amer. Exp. Co., 138 Ky. 704.

(In the last above case it was held that it was improper to join in the same complaint the two causes of action.)

Henderson v. Ky. Cent. R. Co., 86 Ky. 389;
McCafferty v. Pa. Rd. Co., 193 Pa. St. 339;
Edwards v. Gimbel, 202 Pa. St. 30;
Fritz v. W. U. Tel. Co., 25 Utah 263;
Hartigan v. So. Pac. Co., 86 Cal. 142;
Daubert v. Western Meat Co., 139 Cal. 480;
Monroe v. Dredging, Etc., Co., 84 Cal. 515;
Andrews v. Hartford. Etc.. Rd. Co., 34 Conn. 57;
Legg v. Britton, 64 Vt. 652;
Lockwood v. N. Y., 89 N. Y. 24;
3 Elliott on Railroads, Sec. 1375 and note.

In the case of St. L., I. M. & S. v. Hesterly, 228 U. S. 702, there were two causes of action stated in the complaint, the one for compensation to the next of kin and the other for pain and suffering. This Court treated these as separate and distinct causes of action, although this point was not directly passed upon.

If the language of the statute means anything at all, it means that the next of kin or administrator suing for them, shall, if both causes of action are set out in separate counts of complaint, **elect** whether or not a recovery shall be had for pain and suffering or for pecuniary loss sustained by the surviving next of kin, before the case is finally submitted to Court or jury. Hence, our motion should have been sustained.

The coal car in question was taken from the train when it arrived at Ft. Smith and placed temporarily upon the **storage** track with other bad-order cars, because the tracks set apart for bad-order cars were full. On day of accident room had been prepared for the coal car and other bad-order cars, on the **repair track**, and they were being removed there, in the same yard when the accident occurred. The coal car had been set out on the main track about five minutes before the accident, because it had no coupler, and the crew had to come in and couple it on opposite end from defective coupler. The employes were starting back to get the coal car to place it on repair track, when deceased, wih knowledge of its presence, and with full knowledge of the manner in which the business was conducted there, with rule 93 before him, requiring that he take no chance, yet under such circumstances, when his associates retired in safety and he had ample time to do so, he took his life into his own hands, and thus brought about his own destruction.

In view of these facts, we insist that the case should be reversed and the cause dismissed.

W. F. EVANS,
Attorney for Plaintiff in Error.

B. R. DAVIDSON,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 166.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
Plaintiff in Error,

vs.

FANNIE M. CONARTY, ADMINISTRATRIX OF THE ESTATE OF W. F. CONARTY, DECEASED.

SUPPLEMENTAL BRIEF FOR RAILROAD COMPANY.

VII.

MOTION TO COMPEL PLAINTIFF TO ELECT.

1. *Actions under the First and Ninth Sections can not co-exist.*

The Seventh Assignment of Error (Transcript of Record, page 107) is to the decision of the Supreme Court of

Arkansas that the administratrix was not required to elect whether she would prosecute her cause of action for compensation (under the First Section of the Federal Employers' Liability Act as amended) or her cause of action for pain and suffering (under the Ninth Section of the Act added by amendment of April 5, 1910).

The Statute in creating a remedy for conscious pain and suffering set the limitaton "but in such cases there shall be only one recovery for the same injury." The Supreme Court of Arkansas held (106 Ark., 421) that this amendment to the Statute forbade the prosecution of more than one action and permitted only one recovery but allowed a recovery in this action not only for the death of Conarty but for his conscious pain and suffering as well.

Conarty was injured on the 13th of November, 1910, and died on the 19th of the same month. The verdict of the jury for $10,000.00 in favor of the administratrix is based expressly under the instructions of the Court upon the dual theory that a recovery may be had for the value of his life and in the same action for his personal pain and suffering for which he might himself have had an action if he had lived. The refusal of the court to require election has thus in this case resulted in a recovery which by the very nature of the elements submitted to the jury, must necessarily go beyond pecuniary damage to the beneficiaries. The policy of Congress in enacting the original statute was, as this Court has in a series of decisions found occasion to point out, to limit the recovery to the pecuniary damages to the particular beneficiaries in each case. For instance, parents must plead and prove pecuniary damage in order

to recovery for the death of a son: *Louisville & Nashville Railroad Company v. Garrett*, 231 U. S., 298. The amendment of April 5, 1910, by which the Ninth Section was added, the section covering conscious pain and suffering, was not, it is submitted, intended to depart from this policy. Congress, in enacting that amendment, used the same words of limitation to define the beneficiaries as Congress had used in enacting the First Section. Recovery in both Sections is for the use of the "surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee." If Congress, by these words of limitation in the First Section confined the Act to pecuniary damage, then necessarily Congress must have had the same intention by using the same words in enacting the Ninth Section. But the refusal of the Court of Arkansas to require the plaintiff to elect has resulted in super-imposing upon the action to compensate the beneficiaries by the death of Conarty another cause of action which in this particular case must be in addition to the pecuniary damage. In *Gulf, Colorado & Santa Fe Ry. Co. v. McGinnis*, 228 U. S., 173, Mr. Justice Lurton, after remarking that the recovery must be limited "to those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss," held that it was for the jury to apportion the recovery among the beneficiaries according to his or her individual pecuniary loss, remarking, "this will, of course, exclude any recovery in behalf of such as show no pecuniary loss." Upon what rational ground can the apportionment

be made by the jury unless the pecuniary limitation governs as in the 1st Section?

Congress meant to preserve death remedies so far as might be necessary in any given case to secure compensation to the beneficiaries as they existed in that case for their pecuniary damage; but Congress did not intend by the Amendment of 1910 to extend the Act into the field of speculation by surviving relatives irrespective of their pecuniary damage. The refusal of the Court below to direct an election in this particular case has had the result of extendng the Act beyond pecuniary damage. The jury, if guided by the instructions of the Court, as we must presume they were, would find first the value of the life to the particular beneficiaries present here and then add to that recovery an element not intended by Congress to be recovered in any case—an element of damage for conscious pain and suffering *irrespective of and in addition to the pecuniary injury of the particular beneficiaries.*

As we shall later suggest there was but one gap in the original law which Congress meant to fill, namely, the case of conscious pain and suffering, and death from some *other cause* than the injury, which gap the Ninth Section filled. The matter was safeguarded in enacting that Section by declaring that there should be only one recovery, this to prevent the misapprehension that in any case there could be a double recovery of pecuniary damage to the surviving beneficiaries for the death and damages for conscious pain and suffering unrelated to the pecuniary damage of the particular beneficiaries.

Mr. Justice Holmes, speaking for this Court in *St. Louis,*

Iron Mountain & Southern Railway Company v. Hesterly, 228 U. S., 702, said:

> "The amendment of April 5, 1910, chap. 143, Sec. 2, 36 Stat., at L. 291, U. S. Comp. Stat. Supp. 1911, p. 1325, in like manner allows but one recovery, although it provides for survival of the right of the injured person."

2. *Legislative history of the Ninth Section.*

In *Johnson v. Southern Pacific Co.*, 196 U. S., 1, this Court declared that the legislative reports to Congress, etc., describing the intent in enacting a law, are important. Section 9 of the Federal Employers' Liability Act, added by Act of Congress of April 5, 1910 (36 St. at L., 291), is as follows:

> "Section 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

Gaps were found in two cases in the Junior Federal Courts (*Fulgham v. Midland Valley R. Co.*, 167 Fed., 660, Circuit Court, 1907, and *Walsh v. New York, New Haven & Hartford Railroad Co.*, 173 Fed., 494, Circuit Court, 1909), in that the death action did not permit recovery for conscious pain and suffering. Congress thereupon recon-

sidered the subject with care, and by the Amendment of April 5, 1910, filled the gap which Congress thought had not been filled by the Act as originally passed. The legislative history as disclosed in the reports of Commitees and the debates on these reports shows the sole purpose of the amendment: Vol. 45, Part 3, Congressional Record 61st Congress, Second session, pages 2253-4. Mr. Sterling, a member of and speaking for the House Commitee in explanation of the House report in favor of the bill said (Vol. 45, Congressional Record, page 2253):

> "The third amendment relates to the survival of the action. One of the Courts in Connecticut held that under this law, *where the injured party died before action was commenced or after action was commenced from some other cause than the injury,* the action did not survive to the personal representative of the deceased. This provides that the action shall survive to the personal representative for the benefit of the widow or next of kin in the order named in the original law." (Italics ours.)

Further explaining the amendment Mr. Sterling said (page 2258):

> "It simply provides that where the action survives, then the damages are limited to compensatory damages. *For instance, if the injured man brings a suit and dies, before judgment, from other causes than the injury,* then, under this provision of the bill, the action survives to recover compensatory damages only." (Italics ours.)

The First Section gives an action for death which is fully compensatory to the particular beneficiaries in each case. But that Section did not provide any action in case of injury, conscious pain and suffering, and death from *some other cause* than the injury. The Ninth Section was enacted solely to cause this action, which died at the common law and was not saved by the Act as originally passed April 22, 1908, to survive, subject, however, to the same limitation as in the First Section that no more could be recovered than the pecuniary damage.

In the case at bar the death was caused by the injury as stated by the declaration which charges (Transcript of Record page 3) that on the 19th of November, 1910, "said intestate died from said injuries." Not only should the Court have required the plaintiff to elect but the Court should have required the plaintiff to proceed under Section 1 as by her pleading she negatived the existence of any cause of action under Section 9.

At the argument we shall press Assignments of Error III (Proximate Cause), VII (Motion to compel election), and VIII (Refusal to direct a verdict for the defendant). All other Assignments of Error are hereby expressly abandoned.

Respectfully submitted,

THOMAS P. LITTLEPAGE,

Attorney for St. Louis & San Francisco Railroad Company, Plaintiff in Error.

January, 1915.

Office Supreme Court, U. S.
FILED
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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1914.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, *Plaintiff in Error,*

vs.

FANNIE M. CONARTY, Administratrix of the Estate of W. F. CONARTY, Deceased, *Defendant in Error.*

No. 166.

Petition for Leave to File Brief as Amici Curiae

AND

Suggestions of Samuel W. Moore, Frank H. Moore and James B. McDonough, Amici Curiae.

SAMUEL W. MOORE,
FRANK H. MOORE,
JAMES B. MCDONOUGH,
Attorneys for The Kansas City Southern Railway Company.

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1914.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, *Plaintiff in Error,*

vs.

FANNIE M. CONARTY, Administratrix of the Estate of W. F. CONARTY, Deceased, *Defendant in Error.*

No. 166.

PETITION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE.*

Come now Samuel W. Moore, Frank H. Moore, and James B. McDonough, and ask leave to file the brief presented herewith, as *amici curiae* in the above entitled cause, upon the question of the proper interpretation of the Federal Employers' Liability Act as amended by the addition of section 9 of that act.

Petitioners show the court, as reason for their application, that they represent The Kansas City Southern Railway Company in case No. 538, October Term, 1914, entitled *The Kansas City Southern Railway Company, Plaintiff in Error,* v. *Sam E. Leslie, Administrator, etc., Defendant in Error,* which is pending in this court upon writ of error to the Supreme Court of Arkansas, in which there is also involved the proper interpretation of said act as amended.

Inasmuch as some of the questions presented for determination in this court are common to both cases, and as it is probable that this cause will be decided before the Leslie case can be reached for argument, the petitioners respectfully pray that their application may be granted, and their brief received and filed.

SAMUEL W. MOORE,
FRANK H. MOORE,
JAMES B. MCDONOUGH,
Attorneys for The Kansas City Southern Railway Company.

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FANNIE M. CONARTY, Administratrix of the Estate of W. F. CONARTY, Deceased, *Defendant in Error.*

No. 166.

SUGGESTIONS OF SAMUEL W. MOORE, FRANK H. MOORE, AND JAMES B. McDONOUGH, *AMICI CURIAE.*

The questions involved in case No. 538, pending in this court on writ of error to the Supreme Court of Arkansas, entitled *The Kansas City Southern Railway Company* v. *Leslie, Administrator,* arise under the Federal Employers' Liability Act, and involve a determination of the effect of the addition of section 9 of that act by the amendment of April 5, 1910.

In the Leslie case, in which the undersigned represent the plaintiff in error, the plaintiff administrator was permitted in the state court to recover, on behalf of the deceased employe's widow and child, *not only* the pecuniary loss suffered by them through the death of the husband and father under Section 1, but he was *also* permitted to recover, under Section 9, for the pain and suffer-

ing of the deceased employe, who lived about an hour and a half after the accident. Leslie, as administrator of the estate of Old, the deceased, brought suit in the state court, placing the compensatory damages for the widow and child at $15,000 and the damages due to pain and suffering at $10,000. The jury returned a verdict for the full sum of $25,000 claimed. The Circuit Court of Little River County ordered a remittitur of $7,000 leaving the judgment at $18,000. The plaintiff offered no testimony from the widow or any one else tending to show the amount of contributions made by the deceased to the widow and child. The Supreme Court of Arkansas, in upholding the verdict against an attack that it was excessive, estimated that the compensatory damages amounted to $14,518, and that the damages for pain and suffering amounted to $3,432. In the Leslie case we question the soundness of that estimate on the ground that there is not sufficient testimony to sustain it.

It is our contention that the state court, in its construction of the act as amended by the addition of Section 9, as well as in other respects, misconstrued the act to the disadvantage of the plaintiff in error.

Since the question of the proper construction of the Employers' Liability Act, as amended by the addition of section 9, is involved in the case of *St. Louis & San Francisco Railroad Company* v. *Conarty,* we have asked permission to file this brief in that case, in order to place before the court our contention as to the proper construction of the amended act.

I.

Our contention as to the proper construction of the Act as amended.

We contend that the amended act should be interpreted as follows:

(a) The Federal Employers' Liability Act was intended to be complete in itself, so as to afford compensation to employes, and to their personal representatives in case of death, for the pecuniary loss suffered by the employes, or by their beneficiaries, and this rule applied in all cases of injuries to employes, and in all cases of injuries resulting in death whether death was instantaneous or not.

(b) It developed, from a judicial construction of the act, that, where an employe was injured, and subsequently died from *some other cause* than his injuries, his cause of action died with him, so that those dependent upon him received no compensation, and it was thought by Congress to be desirable that such cause of action should survive, for the benefit of the same beneficiaries, and hence, section 9 was added to the original act, in order to provide for a survival of the cause of action in these circumstances.

II.

The original Act, whose purpose was to compensate certain designated beneficiaries for the pecuniary loss suffered by them through the death of an employe, omitted to make provision for the recovery of compensation where an injured employe died from some independent cause, so that his cause of action died with him. It was the purpose of Section 9 to supply this deficiency.

The original act (Sec. 1, Emp. Liability Act of April 22, 1908) provided:

> That every common carrier * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of

such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of the next of kin dependent upon such employe, for such injury or death. * * *

The purpose of the original act, in case the employe died *from the injury*, whether instantaneously or afterwards, was to compensate certain designated beneficiaries to the extent of their *pecuniary loss*. As this court said in *Michigan Central R. Co.* v. *Vreeland*, 227 U. S., 59:

> The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employe wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. * * *
>
> The distinguishing features of this act (Lord Campbell's Act) are identical with the Act of Congress of 1908 before its amendment. First, it is grounded upon the original wrongful injury of the person. Second, it is for the exclusive benefit of certain specified relatives. Third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries.

In *Gulf, Colorado & Santa Fe Railway Company* v. *McGinnis*, 228 U. S., 173, the court said:

> In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss.

In *North Carolina R. Co.* v. *Zachary*, 232 U. S., 248, the court said:

> * * * there was neither averment in the pleadings nor evidence at the trial that deceased left a widow, child, parent, or dependent next of kin. Persons thus related to deceased

are the respective beneficiaries of the action prescribed by the act of Congress, and the damages are to be based upon the pecuniary loss sustained by the beneficiary.

In the case of *Norfolk & W. R. Co.* v. *Holbrook*, 35 Sup. Ct. Rep., 143, a case in which the injury occurred after the act was amended by the addition of section 9, the court said:

> Under the employers' liability act, where death is instantaneous, the beneficiaries can recover their pecuniary loss and nothing more; but the relationship between them and the deceased is a proper circumstance for consideration in computing the same.

Early decisions construing the original act made it clear that in no case did the right of action of the employe survive. For instance, in the case of *Fulgham* v. *Midland Valley R. Co.*, 167 Fed., 660, decided February 19, 1909, the court, l. c. p. 664, said (italics ours):

> In the opinion of the court the right of action given to the injured employe by the act of April 22, 1908, does not survive to his personal representative in the event of his death, but, as at common law, perishes with the injured person. *I might add that this conclusion is in harmony with the known purposes of the act, which was intended to make some provision for the unfortunate family of the deceased employe,* and not to make provision for the creditors of his estate. Can it be supposed that Congress would make a railroad company the insurer of an employe, killed in its service, for the purpose of paying the debts the employe had incurred in his lifetime? And yet that would be the inevitable result if the contention of plaintiff's counsel is sound, for whatever is recovered on account of injuries sustained and for which the injured employe had a cause of action in his lifetime must go to his estate. Indeed, such is the prayer of the complaint in this very case.

The above decision to the effect that, under the original act, the right of the employe did not survive, is supported by the decisions of this court.

In *Michigan Central R. Co.* v. *Vreeland*, 227 U. S., 59, the court said:

> The Act of 1908 does not provide for any survival of the right of action created in behalf of an injured employe. That right of action was therefore extinguished. The act has been many times so construed by the circuit courts. We cite a few of the cases. *Fulgham* v. *Midland Valley R. Co.*, 167 Fed., 660; *Walsh* v. *New York, N. H. & H. R. Co.*, 173 Fed. 495.

In *American Railroad Company* v. *Didricksen*, 227 U. S., 145, the court said:

> The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained.

In *Garrett* v. *L. & N. R. Co.*, 35 Sup. Ct. Rep., 33, the court said:

> The third count of the declaration under consideration states no cause of action. The employe's right to recover for injuries did not survive him.

The decisions of the lower Federal courts in *Fulgham* v. *Midland Valley R. Co.*, *supra*, and *Walsh* v. *N. Y., N. H. & H. R. Co.*, *supra*, therefore, had demonstrated, before the passage of the amendment of April 5, 1910, that in no case did the right of action of the injured employe survive. What omission was there to be supplied, having in view the scope and purpose of the act? If the employe lived, he was provided, under section 1, with a complete remedy for the recovery of all damages suffered by him through the wrongful act or default of the common carrier. If

the employe died *from his injury*, before recovering judgment for the damages sustained by him, the designated beneficiaries were provided with a complete remedy, under section 1, for the recovery of all that they were entitled to, *i. e.*, their pecuniary loss.

This was true whether death resulting from the injury was instantaneous or not. In *Michigan Central R. Co.* v. *Vreeland*, 227 U. S., 59, the court said:

> There is no express or implied limitation of the liability to cases in which the death was instantaneous.

The only omission, therefore, in the original act, was the failure to provide for the survival, in favor of the designated beneficiaries, of the right of action of the employe in case of his death, from some cause other than the injury. The purpose of the act, and the history of the passage of the amendment of April 5, 1910, show that the addition of section 9 was in order to cover this last mentioned contingency and that alone.

Section 9, which was added by the amendment of April 5, 1910, provides:

> That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury.

As will be noted, the same words are used to designate the beneficiaries as in section 1, and it is provided that they shall be the husband or widow and children, or parents, or next of kin, dependent upon the employe. The act does not provide that the cause of action of the deceased employe shall survive in favor of his estate, as is often done in the case of state statutes. See *Fulgham* v. *Midland Valley R. Co.*, 167 Fed., 660, in which the plaintiff's petition was modeled upon the Arkansas statute and in

which the court, l. c. p. 661, said of the Arkansas statute (italics ours):

> It is apparent that these two separate and distinct causes of action are modeled upon the legislation of the State of Arkansas (Kirby's Digest, secs. 6285-6290), which were interpreted in the case of *Davis* v. *Railway*, 53 Ark., 117, 13 S. W., 801, 7 L. R. A., 283. In that case, one cause of action was given under section 6285, and the other under sections 6289 and 6290. *The former* was for the benefit of the *estate; the latter* for the benefit of the *widow and next of kin.*

The decision in the above case is supposed to be chiefly responsible for the addition of section 9 of the Act, but Congress did not, in the amendment, make the deceased employe's cause of action survive for the benefit of his *estate.* Congress made it survive for the benefit of the same *dependent relatives* who had been specified in section 1. Under the terms of both sections, if there is no dependent relative, there is no survival.

In *Thomas* v. *Chicago & N. W. Ry. Co.*, 202 Fed., 769, the court said (italics ours):

> The right of action given to the dependent relatives by the act is independent of that given to the decedent, and does not include any damages that he might have recovered from the carrier, had he lived, but is given to them for the pecuniary loss which they may have sustained because of his untimely death. Prior to the amendment of April 5, 1910, the right of recovery given to the injured employe did not survive his death, but died with him. *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S., 59, 33 Sup. Ct., 192. By that amendment the right of recovery given to decedent survives his death, but not, however, for the benefit of his estate, but of specified relatives in the order stated, and *for the pecuniary loss which they may have sustained because of his death. If no such relative survives the decedent, then no right of recovery is given by the act to his personal representative.*

In *Melzner* v. *Northern Pac. R. Co.*, (46 Mont., 162), 127 Pac., 1003, the court said:

> The first section of the federal statute, *supra*, omits any provision on this subject (of survival). Hence, as the act stood prior to the enactment of Section 9, it was held, under the common-law rule, that, upon the death of the injured employe, the right of action given him died also. * * * Clearly section 9 was intended to supply this defect and had no other purpose, because it declares that "any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit," etc., naming the beneficiaries mentioned in section 1. It is to be observed that, whether the action is for a recovery for the death of the employe or for injuries sustained by him for which he might have maintained an action, the person who must bring or continue the action is the same, viz., the personal representative. The beneficiaries in each case are the same.
>
> This brings us to the inquiry: When the action is brought by the personal representative, is it necessary to allege in the complaint that there are in existence persons answering the description of the beneficiaries named in the statute? This must be so. The action is statutory. Without the statute, the right to bring it would not exist. The representative is vested with the right to bring it, but only for the benefit of those who are named in the statute. He is thereby made a statutory trustee for them, not for the benefit of the decedent's estate. The fund recovered goes to the beneficiaries, not by virtue of the law of succession, but because it is given them by the statute. Therefore, if there is no beneficiary within the description of the statute, there is no right of action; for the liability of the defendant is made contingent upon the existence of one or more beneficiaries. If there are none, there is no liability.

We may consider, not only the defect in the original act as pointed out by the courts, which the amendment was presumably intended to remedy, but we may also consider the legislative history of the amendment; for it is well settled in this court that reference may be had to the legislative history of such acts of Congress, for the purpose of aiding in the ascertainment of the

intention of Congress in passing the legislation. See *Johnson* v. *Sou. Pac. Co.*, 196 U. S., 1.

The intention of Congress to supply, by the addition of section 9, the omission in the original act, which permitted no recovery where the injured employe died from some other cause, is made plain in the legislative proceedings when the passage of the amendment was under consideration.

Mr. Sterling, a member of and speaking for the House Committee (Congressional Record, 61st Congress, 2nd Session, Vol. 45, p. 2253), said (italics ours):

> The third amendment relates to the survival of the action. One of the courts in Connecticut held that under this law where the injured party died before action was commenced, or after action was commenced, *from some other cause than the injury*, the action did not survive to the personal representative of the deceased. This provides that the action shall survive to the personal representative for the benefit of the widow or next of kin in the order named in the original law.

In further explanation of this amendment Mr. Sterling (p. 2258 of said Congressional Record) also said (italics ours):

> It simply provides that where the action survives, then the damages are *limited to compensatory damages;* for instance, if the injured man brings a suit and dies before judgment *from other causes than the injury*, then, under this provision of the bill, the action survives to recover *compensatory damages only*.

It is therefore clear that the passage of this act of April 5, 1910, was for the sole purpose of providing compensatory damages in the event that the injured party died from other causes after the injury and before recovery.

The purpose above stated is carried out in the wording of section 9 by providing that the cause of action shall survive, for the benefit of the same dependent relatives who are named in the original act; and also, by providing that "in such cases there shall be only one recovery for the same injury."

III.

The personal representative has only one right of action, which is under Section 1 in all cases except where the employe dies from some cause other than the injury, in which latter case his right of action is under Section 9.

It is well settled that the right of action given to the employe under the act is an entirely different and distinct right of action from that given to the beneficiaries on account of the death of the employe. In *Michigan Central R. Co.* v. *Vreeland*, 227 U. S., 59, the court said:

> The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employe wrongfully injured for the loss and damage resulting to them financially by reason of the wrongful death. * * * This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only.

In *Garrett* v. *L. & N. R. Co.*, 35 Sup. Ct. Rep., 33, the court said:

> The questions presented are: First, whether, under the employers' liability act of 1908 (before amendment of April 5, 1910) the administrator of one who died of painful injuries suffered while employed in interstate commerce by a railroad engaging therein can recover damages for the benefit of the estate (third count); and, second, whether, if such administrator sue for the benefit of the employe's parents, there being no surviving widow or husband or child, it is necessary to allege facts or circumstances tending to show that, as a result of the death, they suffered *pecuniary* loss (first and second counts). * * * It is now definitely settled that the act declared two distinct and independent

liabilities resting upon the common foundation of a wrongful injury: (1) liability to the injured employee for which he alone can recover; and (2), in case of death, liability to his personal representative "for the benefit of the surviving widow or husband and children," and if none, then of the parents, which extends only to the *pecuniary* loss and damage resulting to them by reason of the death.

In *American Railroad Company* v. *Didricksen*, 227 U. S., 145, the court said:

> The cause of action which was created in behalf of the injured employe did not survive his death, nor pass to his representatives, but the act, in case of the death of such an employe from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute.

It is clear that there cannot be a recovery on both causes of action, for the act provides "there shall be only one recovery for the same injury."

In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hesterly*, 228 U. S., 702, the court says:

> In the case of death, the only action is one for the benefit of the next of kin. Sec. 1. *Michigan Central R. Co.* v. *Vreeland*, 227 U. S., 59, 67, 68; *American R. Co.* v. *Didricksen*, 227 U. S., 145; *Gulf, C. & S. F. R. Co.* v. *McGinnis*, 228 U. S., 173, 175. Therefore the ruling of the state court was wrong. The amendment of April 5, 1910, Chap. 143, Sec. 2, 36 Stat. at L. 291, U. S. Comp. Stat. Supp., 1911, p. 1325, in like manner allows but one recovery, although it provides for survival of the right of the injured person. The amendment, however, does not apply to this case, as the death occurred in August, 1909.

Thornton in his work on The Federal Employers' Liability and Safety Appliance Acts, 2nd Ed., in discussing the effect of Section 9, says, p. 167 (italics ours):

> Under the Federal Statute, the administrator has his option, when the deceased has brought an action during his

lifetime to recover damages, to either prosecute that action or dismiss it and bring his own action; *but he cannot wage both causes of action, he must take his choice.*

We think the author would have stated it more correctly if he had said that only one cause of action may be waged, and the law makes the election or choice in determining which cause of action may be waged. Section 9 should be construed in harmony with the remainder of the act. As stated above the original act fully covers liability to the employe if he survives the injury; and also covers liability to the relatives of the employe, in case he dies as a result of the injury. The only matter not covered by the original act, is the survival of the employe's right of action, in case he dies before recovering damages, from some cause other than the injury. Therefore, the latter is the only case in which the employe's right of action survives to the beneficiaries. This is confirmed by the consideration that the beneficiaries under both section 1 and section 9 are limited to their pecuniary loss. If the employe dies as a result of the injury, the beneficiaries may recover under section 1 all that they are entitled to, *i. e.*, their full pecuniary loss. It would serve no purpose to permit allegations also under section 9, which would not entitle them to anything more, and would be calculated to mislead the jury.

The decisions of the various state courts on the question of the right of recovery under their death statutes and survival statutes, depend largely, of course, on the history and terms of the statutes of each state. It is held in the following states having both a death statute and a survival statute, that there cannot be a recovery upon both the death statute and the survival statute.

In *Dolson* v. *Lake Shore & M. S. Ry. Co.*, 128 Mich., 444, 87 N. W., 629, the syllabus is as follows:

Comp. Laws 1897, known as the "Death Act," provides that whenever the death of a person shall be caused by any wrongful act, neglect, or default, which would, if death had not ensued, have entitled the injured party to maintain an

action and recover damages, then the person or corporation causing the death shall be liable to an action for damages in favor of the personal representatives of the deceased for the benefit of the widow or next of kin. How. Ann. St., Sec. 7397 (the "Survival Act") provides that a cause of action for negligent injuries to the person shall survive. Held, that personal representatives had a right of action under the survival act, where the testimony showed that the deceased had survived for a short time after being injured by defendant's negligence, but that recovery could not be had under both acts.

In *Hackett* v. *Louisville, St. L. & T. P. Ry. Co.,* 95 Ky., 236, 24 S. W., 871, the court said:

> Now, this court has decided, and settled the question, that, where certain acts cause death, they cannot be divided so as to make two actions,—one to recover for the suffering caused, and the other to recover for death. The party must elect. See *Conner's Adm'x.* v. *Paul,* 12 Bush, 147. Here, as said, the amendment and petition make two counts, which are in effect two causes of action, when the facts causing the death constitute but one cause of action; and, as they cannot be divided so as to make two actions, neither can two counts, which are in effect two causes of action, be maintained on them.

See, also, *Owensboro & N. Ry. Co.* v. *Barclay,* 102 Ky., 16, 43 S. W., 177; *McCafferty* v. *Pennsylvania R. Co.,* 193 Pa., 339, 44 Atl., 435; *Sawyer* v. *Perry,* 88 Me., 42, 33 Atl., 660.

Other state courts have held that the exclusive remedy in case the injury results in death is under the death statute, the survival statute applying only where the injured party dies from some other cause than the injury. As the question is discussed in detail in *Lubrano* v. *Atlantic Mills,* 19 R. I., 129, 32 Atl., 205, we quote at some length from the decision in that case, in which the court said:

> The question therefore is whether, under our statutes, an administrator has the right to maintain two actions for negligence resulting in death,—one for the benefit of the widow

and next of kin, according to our form of Lord Campbell's Act, and another for the damage to the person, under our statute for the survival of actions.

After discussing various cases, the court continues:

That case states the principle upon which the compensatory act is founded. It creates no new cause of action by reason of the death, but gives a new right of recovery in substitution for the right of action which the deceased would have had if he had survived. Upon this principle the new remedy must be exclusive, since otherwise there would be two recoveries for the same cause of action, namely, the negligence of the defendant, which is the cause of action on which the deceased would have sued at common law, if he had survived. Moreover, the recognized rules of construction lead to the conclusion that the remedy for the death is exclusive. While the act relates to a remedy, it is, nevertheless, in derogation of the common law, because it gives a right of action where none existed at common law, and so it should be strictly construed. The provisions for survival of actions for damages to the person, and for the remedy for the death, have been embodied in the same statute in this state since 1857, although the latter was first adopted. The general provision should not be construed to modify the special, since the intention to modify the former statute by giving an additional remedy is not plain, and both can stand together; the act for survival embracing damages to the person other than those which result in death. This is the construction which was given to precisely similar provisions in *Holton* v. *Daly*, 106 Ill., 131, where it was held that the only cause of action was the wrong done, irrespective of consequences, and that a statute of survival, subsequently passed, did not give a remedy additional to that of the prior act relating to the death. That case had been commenced by the deceased in his life time, but the court held that it could not proceed without amendment alleging and suing for the death. So, in *Railroad Co.* v. *O'Connor*, 119 Ill., 586, 9 N. E., 263, it was held that where the plaintiff, pending an action for injuries, dies from some other cause than the injury, the action survives, and may be prosecuted by his administrator. In *McCarthy* v. *Railroad Co.*, 18 Kan., 46, where both provisions for an action for death and for survival of an action for injury to the person

had been embodied in a revision, as in our own statutes, it was held that they must be construed *in pari materia*, and that the latter provision applied only to cases where the death did not result from the injury. This decision was followed in *Hulbert* v. *City of Topeka*, 34 Fed., 510; but Mr. Justice Brewer, although he had concurred in the opinion, as a member of the state court, and felt constrained to follow it, expressed a doubt of its correctness. See, also, *Hurst* v. *Railway Co.*, 84 Mich., 539, 48 N. W., 44; *Munro* v. *Reclamation Co.*, 84 Cal., 515, 24 Pac., 303; *Hartigan* v. *Southern Pac. Co.*, 86 Cal., 142, 24 Pac., 851; *Andrews* v. *Railroad Co.*, 34 Conn., 57; *Putman* v. *Southern Pac. Co.*, (Or.), 27 Pac., 1033. A further consideration in favor of a single action is the confusion of damages which would result from the maintenance of two actions. Although they might be theoretically separate, a practical separation would be quite impossible. The measure of pain and suffering, or estimated damage to one's estate, cannot be so definitely marked as to limit liberality of a sympathetic jury.

See also, *Martin* v. *Missouri Pacific R. Co.*, 58 Kan., 475, 49 Pac., 605.

Cases arising under statutes of which the Arkansas Statute is an example are not in point, since, as stated in *Fulgham* v. *Midland Valley R. Co.*, 167 Fed., 660, one cause of action under the Arkansas Statute is for the benefit of the *estate*, the other, for the benefit of the *widow and next of kin*.

The purpose of the Federal Act is to provide for certain dependent relatives whether the right of action is under section 1 or section 9. The amendment specifically provides that there shall be only one recovery.

We submit that the purpose of the act, as declared in the decisions of this court, as well as the history of the passage of the amendment, fully support the construction of the amended act which we contend for.

Respectfully submitted,

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The University of Minnesota

THE LAW SCHOOL

1914-1915

BULLETIN OF THE UNIVERSITY OF MINNESOTA
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1914

JULY

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1915

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AUGUST

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OCTOBER

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NOVEMBER

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DECEMBER

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UNIVERSITY CALENDAR

1914-1915

The University year covers a period of thirty-eight weeks, beginning on the second Tuesday in September. Commencement Day is always the second Thursday in June.

1914			
September	1	Tuesday	Registration closes except for new students
September	1-8	Week	Fees payable except for new students
September	8-15	Week	Examinations for removal of conditions, entrance examinations, registration of new students, and payment of fees
September	9-15	Week	Military encampment of cadets
September	16	Wednesday	First semester begins
November	25	Wednesday	Thanksgiving recess begins 9:00 p.m.
November	30	Monday	Thanksgiving recess ends 8:00 a.m.
December	18	Friday	Christmas vacation begins 9:00 p.m.
1915			
January	5	Tuesday	Christmas vacation ends 8:00 a.m.
January	19	Tuesday	Registration for second semester closes
January	25	Monday	Final examinations begin
January	26	Tuesday	Payment of fees for second semester closes
February	3	Wednesday	Second semester begins
February	11	Thursday	First semester class reports due
February	12	Friday	Lincoln's Birthday: a holiday
February	22	Monday	Washington's Birthday: a holiday
March	31	Wednesday	Easter recess begins 9:00 p.m.
April	8	Thursday	Easter recess ends 8:00 a.m.
May	29	Monday	Final examinations begin
June	5	Saturday	Second semester closes
June	6	Sunday	Baccalaureate service
June	7	Monday	Senior class day exercises
June	9	Wednesday	Alumni Day
June	10	Thursday	Forty-third Annual Commencement
June	11	Friday	Summer vacation begins
June	14	Monday	Summer Session begins

The University year for 1915-16 will begin Tuesday, September 7.

NOTE.—During the year 1913-14 there were 101 recitation days the first semester, and 98 the second, inclusive of the final examination periods. In 1914-15 the number of recitation days will be exactly the same.

THE LAW SCHOOL

FACULTY

George Edgar Vincent, Ph.D., LL.D., President	1005 5th St. S. E.
Cyrus Northrop, LL.D., President, Emeritus	519 10th Ave. S. E.
William Reynolds Vance, Ph.D., LL.B., Dean and Professor of Law	412 9th Ave. S. E.
Henry J. Fletcher, LL.M., Professor of Law	317 17th Ave. S. E.
Ernest G. Lorenzen, Ph.B., LL.B., J.U.D., Professor of Law	
Edmund Morris Morgan, M.A., LL.B., Professor of Law	516 9th Ave. S. E.
James Paige, M.A., LL.M., Professor of Law	420 Oak Grove St.
Edward Sampson Thurston, M.A., LL.B., Professor of Law	911 5th St. S. E.
John C. Benson, LL.B., Instructor in Practice	1775 Hennepin Ave.

PROFESSORIAL LECTURERS

Howard S. Abbott, B.L., Minneapolis
Hon. Homer B. Dibell, B.A., LL.B., Commissioner of the Supreme Court of Minnesota
Waldron M. Jerome, B.S., LL.B., Minneapolis
Frederick H. Stinchfield, B.A., LL.B., Minneapolis

SPECIAL LECTURERS, 1913-14

Rome G. Brown, B.A., Minneapolis
Charles W. Bunn, B.S., St. Paul
Hon. Edmund S. Durment, LL.B., St. Paul
Arthur L. Helliwell, LL.M., Minneapolis
Hon. Charles S. Jelley, Judge of the District Court, Hennepin County
Hugh V. Mercer, LL.M., D.C.L., Minneapolis
Christopher D. O'Brien, St. Paul
Hon. Thomas D. O'Brien, St. Paul, formerly Justice of the Supreme Court of Minnesota
Hon. William Howard Taft, LL.D., New Haven, Conn., Ex-President of the United States
Hon. John W. Willis, M.A., St. Paul, formerly Judge of the District Court, Ramsey County

OBJECT AND METHOD OF INSTRUCTION

The Law School of the University of Minnesota was established in 1888.

The object of the Law School is to provide a thorough and scientific legal education, and to prepare students for the actual practice of law in any jurisdiction where the English and American legal system prevails. Particular emphasis is laid upon the Minnesota Statutes, the special doctrines of law, and the rules of practice that obtain in this State.

In teaching the various branches of law, the so-called "case system" is employed. This method of teaching law, which has been approved by experience and which is now employed in the leading law schools of the country, has the two-fold merit of enabling the student to acquire a thorough and practical knowledge of legal principles, and to become familiar with those processes of legal reasoning which have determined the form and character of our jurisprudence, and will govern its future development.

The Faculty is composed primarily of resident professional law teachers who devote their entire time and energy to teaching. The courses in practice are taught by men experienced in practice at the Minnesota bar. In addition, courses of lectures on special topics, chiefly relating to professional ethics and practice, are given by distinguished lawyers and judges, selected primarily from the bar of Minnesota.

GENERAL INFORMATION

For information concerning admission requirements, registration, fees, libraries, buildings and other equipment, expenses of living, prizes, and other matters of general interest to students in the University, see the Bulletin of General Information.

COMBINED SIX-YEAR COURSE LEADING TO DEGREES OF BACHELOR OF ARTS AND BACHELOR OF LAWS

Academic students who have by the end of their junior year completed one major and two minors and have completed courses aggregating ninety credits, with a mark of *good* in half their work, may take during their senior year, the first-year law course, and upon completion of the same with an average of *good* in half of such work, will be given the B.A. degree. Upon completion of the work of the second- and third-year classes in Law, such students will receive the degree of Bachelor of Laws, thus obtaining both degrees in six years.

PRE-LEGAL COURSE

Students who contemplate studying law are strongly urged to devote at least three years to collegiate work before entering the Law School. In the opinion of the Law Faculty, it is desirable that a prospective law student, devoting three or more years to collegiate work before undertaking the study of law, should take in his undergraduate years, courses aggregating at least two years of work in each of the following subjects: English Composition (Rhetoric), Latin, a modern language, History (particularly English and American Constitutional History), Mathematics, Economics and Political Science, and courses aggregating at least one year's work in Science, Sociology, Psychology and Logic, and Public Speaking.

TWO-YEAR PRE-LEGAL COURSE

For those who can not devote more than two years to collegiate work before entering the Law School, the College of Science, Literature, and the Arts offers a special pre-legal course in which the following subjects are prescribed:

FRESHMAN YEAR

	Credits
Rhetoric 1-2	6
Mathematics or Science	6 (or 10)

(1) The student without entrance credits in Higher Algebra, Mathematics 1 and 2

(2) The student with entrance credits in Higher Algebra, but not in Solid Geometry, Mathematics 3 and 4.

(3) The student with entrance credits in Higher Algebra and Solid Geometry, Mathematics 3 and 4, *or* 6 credits in freshman science.

Language ..... 6 (or 10)

(1) The student with two or more units of entrance credits in Latin is earnestly advised to take Latin (6 credits).

(2) The student not taking Latin must take French or German.

History 3-4 6

Economics 1 ..... } 6
Political Science 1 ..... }

Military Drill and Gymnasium, for men

28—34

SOPHOMORE YEAR

Rhetoric 15-16 6

Language ..... 4—6

A continuation of the same language taken in freshman year.

History 5-6 6

Economics ..... }
1 (if not previously taken), and 3, and not more than three of the following courses: 5, 12, 13, 15, 17, 22, 35-36, 42, 44, 47. } 6—18
Political Science ..... }
Not less than one nor more than four of the following courses: 1 (if not previously taken), 3, 5, 6, 8, 9, 11 }

Military Drill

28—34

While students who have completed two years of the regular Academic course offered by the College of Science, Literature, and the Arts in accordance with the regulations of that College,† are eligible to enter the Law School, the Law Faculty strongly recommends those who enter the College of Science, Liferature, and the Arts with the purpose of qualifying for admission to the Law School, to take the special pre-legal course described above.

†These regulations require the completion of a minimum of fifty-eight credits.

COURSE OF STUDY

The curriculum leading to the degree of Bachelor of Laws covers a period of three academic years.* The entire work of the first and second years and a portion of the work of the third year are prescribed. Second-year students are allowed to elect a limited number of additional courses, and third-year students are allowed a somewhat more liberal election.

The course consists of fourteen hours of classroom work a week during the first year, thirteen hours a week during the first semester of the second year, and twelve hours a week during the remainder of the course.

Each regular student, unless excused by special action of the Faculty, will be required to take courses aggregating not less than twelve nor more than fifteen hours' work a week during each semester of his first two years, and courses aggregating not less than ten nor more than fifteen hours during each semester of the third year.

In addition to the foregoing, attendance upon all Special Lectures scheduled is required of second- and third-year students; and all students in the Law School may be required to serve as jurors or witnesses in any proceedings before the Practice Court.

All the courses offered by the Law School, except the extension courses, are given in the day time between the hours of 9 a.m. and 5 p.m.

COURSES OF INSTRUCTION

FIRST-YEAR (ALL REQUIRED)

First Semester

No.	Title	Credits
1.	Contracts (1)	4
3.	Torts (1)	3
5.	Criminal Law and Procedure	3
7.	I Property (1)	2
9.	Carriers and Public Service Companies	2

Second Semester

2.	Contracts (2)	3
4.	Torts (2)	3
6.	Domestic Relations	2
8.	I Property (2)	3
10.	Agency	3

*No credit is given for time spent in private reading. The candidate for graduation must spend all three years in residence, either at this Law School or at some other accredited law school. No new student will be admitted to the work of the second semester unless he brings from another law school a certificate of advanced standing, showing his qualification to continue the second semester's work, and unless he registers before the opening of the semester.

SECOND-YEAR (ALL REQUIRED)

First Semester

No.	Title	Credits
11.	Common Law Pleading	2
13.	II Equity (1)	2
15.	Evidence (1)	2
17.	II Property (1)	2
19.	Sales	3
21.	Wills and Administration	2

Second Semester

12.	Code Pleading	2
14.	II Equity (2)	2
16.	Evidence (2)	2
18.	II Property (2)	2
20.	Negotiable Instruments	2
22.	Quasi-Contracts	2

THIRD-YEAR

First Semester

25.	Practice (1) (required)	2
27.	III Property (required)	3
29.	Constitutional Law (1)	2
31.	Trusts	3
33.	Conflict of Laws (1)	2
35.	Mortgages	2
37.	Suretyship	2
39.	III Equity	2
41.	Bankruptcy	1

Second Semester

26.	Practice (2) (required)	2
28.	Private Corporations (required)	2
30.	Constitutional Law (2)	2
32.	Partnership	2
34.	Conflict of Laws (2)	2
36.	Extraordinary Legal Remedies	2
38.	Insurance (omitted 1914-15)	
40.	Damages	2
42.	Taxation	1
44.	Municipal Corporations	1
46.	International Law	1

FIRST-YEAR COURSES

1-2. CONTRACTS. Offer and acceptance; contracts under seal; the Statute of Frauds; rights of beneficiaries and assignees; joint and several

contracts; conditions; illegality; impossibility; duress; performance and discharge of contracts. Williston, *Cases on Contracts*, Vols. I and II. MORGAN.

3-4. TORTS. The general principles underlying the law of civil liability for wrongful conduct, and the specific wrongs of deceit, defamation, malicious prosecution, interference with contracts and trade, etc. Ames and Smith, *Cases on Torts* (edition of 1909-10), Vols. I and II. LORENZEN.

5. CRIMINAL LAW AND PROCEDURE. The common and statutory law of crimes, its historical development and practical application; criminal procedure. Mikell, *Cases on Criminal Law and Criminal Procedure*. PAIGE.

6. DOMESTIC RELATIONS. Marriage and divorce; parent and child; guardian and ward; property law peculiar to the married relation; rights and liabilities of persons under the disabilities of coverture, infancy, insanity, etc. Paige, *Cases on Domestic Relations*. PAIGE.

7. I PROPERTY (1). Real and personal property distinguished; acquisition of title to personal property; accession, confusion; gifts; finding; property rights of bailor and bailee; possessory liens; pledges; fixtures. Gray, *Cases on Property* (second edition), Vol. I. VANCE.

8. I PROPERTY (2). Real property; feudal tenures and their incidents; the several kinds of estates in land; uses and trusts; emblements; waste; rights as to air and water; easements. Gray, *Cases on Property* (second edition), Vols. I and II. VANCE.

9. CARRIERS AND PUBLIC SERVICE COMPANIES. Origin and development of the law of public callings; common carriers of goods and passengers; telephone, telegraph, gas, electric companies; limitation of liability; state and federal regulation. Willis, *Cases on Bailments, Carriers, and Public Callings*. FLETCHER.

10. AGENCY. Principal and agent, master and servant—their rights and obligations, mutually and as to third persons; creation and termination. Wambaugh, *Cases on Agency*. THURSTON.

SECOND-YEAR COURSES

11. COMMON LAW PLEADING. Scope of the action, necessary allegations in declaration, and defenses in each form of action at common law; rules governing pleadings in all forms of action at common law. Whittier, *Cases on Common Law Pleading*. MORGAN.

12. CODE PLEADING. Relation of code pleading to common law pleading; requisites of complaint, answer, demurrer, reply; motions respecting pleadings; amendment; aider; bills of particulars; parties; joinder of

causes of action; construction of pleadings. Sunderland, *Cases on Code Pleading.* MORGAN.

13-14. II EQUITY. Nature of equity jurisdiction; injunctions; specific performance; bills for account. Ames, *Cases on Equity,* Vol. I. THURSTON.

15-16. EVIDENCE. Nature of evidence; judicial notice; burden of proof; presumptions; admissions; character evidence, confessions, hearsay; opinion evidence; real evidence; writings; parol evidence rule; competency, privilege, and examination of witnesses. Thayer, *Cases on Evidence* (second edition). JEROME.

17. II PROPERTY (1). Covenants running with land; public rights, including waters and highways; franchises; rents. Gray, *Cases on Property* (second edition), Vol. II. VANCE.

18. II PROPERTY (2). Conditional and future interests, including conditional estates, reversions and remainders, rule in Shelley's case, future uses, executory devises, cross limitations, etc. Gray, *Cases on Property* (second edition), Vol. V. FLETCHER.

19. SALES. Contracts resulting in the transfer of title to personal property, and the special rights and remedies of the buyer and seller. Williston, *Cases on Sales* (second edition). LORENZEN.

20. NEGOTIABLE INSTRUMENTS. Formal and essential requirements of negotiable instruments, and the nature of the liability of the respective parties thereto; acceptance; endorsement; transfer; presentment; notice of dishonor; the Negotiable Instruments Law. Colson's Huffcutt, *Cases on Negotiable Instruments.* PAIGE.

21. WILLS AND ADMINISTRATION. Historical originals of the law of succession; testamentary capacity; execution, revocation, and republication of wills; descent; probate of wills and administration of estates. Costigan, *Cases on Wills.* PAIGE.

22. QUASI-CONTRACTS. Those obligations imposed by law which are enforced by action of assumpsit. THURSTON.

THIRD-YEAR COURSES*

25-26. PRACTICE (required). This course deals with the various proceedings in an action from the commencement thereof, through trial and appellate courts, to final satisfaction of judgment, including work in practice court. Sunderland, *Cases on Trial Practice.* MORGAN, STINCHFIELD, BENSON.

**Note.*—Third-year students are required to complete the courses in Practice, Private Corporations, III Property, and such other of the third-year courses as will aggregate with the above required courses not less than twenty-four credit hours, provided that no student may take less than ten nor more than fifteen hours in either semester of the third year.

27. III PROPERTY (required). Adverse possession, prescription; conveyancing; covenants for title; estoppel; dedication, etc. Gray, *Cases on Property* (second edition), Vol. III. FLETCHER.

28. PRIVATE CORPORATIONS (required). The nature, creation, and citizenship of corporations; *ultra vires* contracts and acts; stock issues; rights and liablities of stockholders; officers and agents of corporations; rights of creditors. Richards, *Cases on Private Corporations.*

29-30. CONSTITUTIONAL LAW.* The nature of the American constitutional system; legislative, executive, and judicial departments; interstate commerce; constitutional limitations; police power; due process of law; taxation; eminent domain, etc. McClain, *Cases on Constitutional Law* (second edition).

31. TRUSTS. Nature and incidents of the trust relationship; methods of creating trusts; rights and obligations of trustee and beneficiary; constructive trusts; charitable trusts. Kenneson, *Cases on Trusts.* THURSTON.

32. PARTNERSHIP. The nature and formation of the partnership relation; the rights and liabilities of the partners, both *inter se* and as to third parties. Gilmore, *Cases on Partnership.* PAIGE.

33-34. CONFLICT OF LAWS. The rules applied by courts in enforcing rights acquired under the law of a sister state or a foreign country. Lorenzen, *Conflict of Laws.* LORENZEN.

35. MORTGAGES. Legal and equitable mortgages of realty and chattels; rights of mortgagor and mortgagee at law and in equity; foreclosure, redemption; extension, assignment, and discharge of mortgages. Wyman, *Cases on Mortgages,* and selected Minnesota cases. DIBELL.

36. EXTRAORDINARY LEGAL REMEDIES. Mandamus; habeas corpus; certiorari; quo warranto; prohibition. Selected cases. DIBELL.

37. SURETYSHIP. The surety distinguished from the guarantor, the guaranty insurer, and the endorser; surety's defenses against creditor; surety's rights to subrogation, indemnity, contribution, and exoneration; creditor's rights to surety's securities. Ames, *Cases on Suretyship.* VANCE.

38. INSURANCE. Omitted in 1914-15.

39. III EQUITY. Interpleader, bills of peace, bills *quia timet,* reformation and rescission for mistake. Ames, *Cases on Equity,* Vol. II. THURSTON.

40. DAMAGES. Exemplary damages; nominal damages; direct and consequential damages; elements of injury; functions of court and jury;

*Note.—Third-year students may elect this course for both semesters or for the first semester only.

liquidated damages; entire and prospective damages; limitations of interest; aggravation and mitigation. Special applications. Beale, *Cases on Damages.* LORENZEN.

41. BANKRUPTCY. Origin, history, and nature of the bankruptcy law; jurisdiction of the courts; acts of bankruptcy; practice; receivers; claims, preferences; assets, trustees; liens; adverse claimants; summary jurisdiction; crimes, composition, discharge. Selected cases. FLETCHER.

42. TAXATION. This course deals only with the legal questions arising in connection with the assessment of property and the levying and collection of taxes. Selected cases. FLETCHER.

44. MUNICIPAL CORPORATIONS. Legislative control; officers and agents; power to incur indebtedness, to pass ordinances, to grant franchises, to levy taxes, to issue securities, to own and operate public utilities; municipal liability for torts. ABBOTT.

46. INTERNATIONAL LAW. International rights and obligations in times of peace and war; states, territorial rights and jurisdiction, nationality. Scott, *Cases on International Law.*

WORK IN PRACTICE

The practice court has divisions corresponding to the District Court and Supreme Court of Minnesota. Each student is assigned a number of cases in which he is required to draw all necessary pleadings, to see to the service of process and pleadings, to conduct the trial, to perfect an appeal, and to prepare all papers in the appellate court. In at least one of the cases so assigned, the student must take steps to secure a provisional or extraordinary remedy.

Members of the third-year class are required to serve as assistants in the office of the Legal Aid Bureau, and to be in the office of the Bureau from 1:30 to 5:30 p. m. daily during the periods assigned for such service.

In connection with the Practice Course, examinations will be given at the end of the first and second semesters. The final examination will cover the work of both semesters.

SPECIAL LECTURES

During the session 1913-14, the lecture courses given were as follows:

Anti-Trust Legislation

Five lectures by the Hon. William H. Taft, Ex-President of the United States.

United States Courts

Six lectures by Charles W. Bunn, General Counsel of the Northern Pacific Railway Company.

The Police Power
Three lectures by the Hon. Thomas D. O'Brien, formerly Justice of the Supreme Court of Minnesota.

The Practice of Criminal Law
Ten lectures by C. D. O'Brien, of the St. Paul bar.

Examination of Real Estate Titles
Ten lectures by Arthur L. Helliwell, of the Minneapolis bar.

Lawyers, Ancient, Medieval, and Modern
Five lectures by the Hon. John W. Willis, former Judge of the District Court of Ramsey County.

The Practice of Law
Eight lectures by the Hon. Charles S. Jelley, Judge of the District Court of Hennepin County.

Procedure in the Federal Courts
Five lectures by H. V. Mercer, of the Minneapolis bar.

The lecture courses to be given during the session of 1914-15 will be announced at the beginning of that session.

UNIVERSITY EXTENSION COURSES IN LAW AT NIGHT

University Extension courses in substantive law not leading to a degree are offered at night by the University of Minnesota, under the immediate direction of the Law Faculty, for the benefit of such properly qualified persons as may desire legal instruction at night, primarily for business purposes.

Any student who has completed with marked success any subject as given in the Extension Course will be admitted to the regular Law School examination given in such subject, and, if successful in passing that examination, will be given full credit for such subject. After thus securing credit for all the subjects taught in the Extension Course in law, and thereupon completing at the Law School of the University of Minnesota the various courses in adjective law required for a degree, such student will be entitled to graduation, provided that previous to taking such examinations he could have qualified as a regular student in the Law School by having completed two years of Academic work in an institution of collegiate rank.

REGULATIONS GOVERNING CLASS WORK, EXAMINATIONS, GRADES, AND PROMOTIONS

Every student registered in the Law School is required to attend with regularity all lectures, whether special or in course, that may be prescribed for his class, to prepare all papers and other class exercises that may be assigned, and to perform all services in connection with the practice court

that may be required of him. These requirements apply to all special students as well as to candidates for graduation. Gross delinquency in discharging these requirements may be regarded by the Faculty as sufficient reason for requiring the delinquent student to withdraw from the school.

Examinations are held at the end of each semester.

A, B, C, and *D* signify passing grades of varying degrees of merit, *A* being the honor mark. *E* signifies a condition and *F* a failure. *I* signifies that the course has not been completed because of illness or a similar reason.

A student who fails in a subject must repeat the subject in course.

A student who receives a condition in a subject is entitled to one examination only to remove such condition. On failure successfully to pass such examination, the student must repeat the subject in course.

Examinations for the removal of conditions are held during registration week in September each year. Special examinations at any other time will be allowed only upon permission of the Faculty and for good cause shown.

A student who is deficient in subjects aggregating eight or more credits (semester hours) will not be promoted to the next higher class. If, in the opinion of the Faculty, such student is not qualified either (1) to continue as a student of law, or (2) to take any more advanced work, he may, by vote of the Faculty, either (1) be denied the privilege of continuing in the Law School, or (2) be required to repeat the entire work of the preceding year.

A student who, at the end of any semester, fails in two or more subjects taken in that semester may by vote of the Faculty be denied the privilege of continuing in the Law School.

Except by special action of the Faculty no student will be allowed to enter upon the work of the second semester of his third year as a candidate for a degree at the forthcoming commencement if he lacks more than sixteen credits of the total amount of work required for graduation.

ELECTIVES IN OTHER DEPARTMENTS OF THE UNIVERSITY

Students in the Law School may be permitted, after completion of the work of the first year, and under proper regulations to elect, without extra charge, courses offered in other departments of the University, provided that such selection does not interfere with their law studies; but such election of courses in other departments may be made only with permission of the Law Faculty. Among the subjects which may be profitably selected are English Composition, English and American Constitutional History, Public Speaking and Debating, Political Science, Economics, and Sociology. Students who elect such work must complete it in a satisfactory manner or withdraw in good standing before they can obtain the law degree.

CASE-BOOKS

The case-books used by the student in his course in the Law School, especially when containing his own annotations, should prove highly valuable to him in after years at the bar. Students are therefore earnestly advised to purchase their own case-books. It has heretofore been the practice, however, for the Law School to provide case-books for the free use of the students. This practice will not be changed at the present time, but will probably be discontinued after the supply of case-books now on hand has been exhausted. A deposit of five dollars is required of students making use of the case-books belonging to the Law School, but this deposit is repaid upon return of the books in good condition.

INQUIRIES

Further particulars as to any phase of the work of the Law School not given herein, or in the Bulletin of Information will be cheerfully given upon request. Communications addressed at any time to the Dean of the Law School, the University of Minnesota, Minneapolis, Minnesota, will receive prompt attention.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 166.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
Plaintiff in Error,

vs.

FANNIE M. CONARTY, ADMINISTRATRIX OF THE ESTATE OF W. F. CONARTY, DECEASED.

SECOND SUPPLEMENTAL BRIEF FOR RAILROAD COMPANY.

VII.

MOTION TO COMPEL PLAINTIFF TO ELECT.

Supplementing previous argument on this point counsel for plaintiff in error invites the court's atten-

tion to the fact that in this case the result of the refusal of the trial court to require the plaintiff to elect has been that the recovery expressly includes two elements (a) pecuniary damage to the beneficiaries, and (b) another additional element, unrelated to pecuniary damage, for the conscious pain and suffering of Conarty. McCulloch, C. J., in rendering the opinion of the Supreme Court of Arkansas in the case at bar, 155 S. W., 93, at page 94, said:

> "The next contention is that the statute does not permit a recovery both for pecuniary loss to the widow and next of kin, and for the pain and suffering endured by deceased, for the recovery of which the right of action of the deceased survived. A motion was made below treating the complaint as setting forth two causes of action, and asking that plaintiff be required to elect which of them she would prosecute. The federal statute as originally enacted gave a cause of action, first, to the injured employee, which, of course, included as elements of damage, pain and suffering endured as well as pecuniary injury resulting from loss of earnings; and, next, to the widow and next of kin in the event of the death of such injured employee, the measure of damages being the pecuniary loss sustained by such widow and next of kin on account of such death. It was held that the cause of action given to the injured person did not survive his death, but died with him, and that a new cause of action then arose in favor of the personal representative for the benefit of the widow and next of kin. Fulgham vs. Midland Valley Rd. Co. (C. C.), 167 Fed., 660; Walsh vs. New York, N. H. & H. R.

Co. (C. C.), 173 Fed., 494. The result was that, if the injured person died after bringing suit, his personal representative could not be substituted to prosecute the suit for the benefit of the widow and next of kin, but had to bring a new action for that purpose, and the pain and suffering endured by the injured person was not an element of recoverable damages sustained by the widow and next of kin, and could not be recovered for their benefit. To change this condition of the law, Congress enacted the amendatory statute approved April 5, 1910 (Chapter 143, 36 Stat., 291, Sec. 2 U. S. Comp. St. Supp., 1911, p. 1325), providing that 'any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband, and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.' The statute as thus amended forbids the prosecution of more than one action, and permits only one recovery; but the action is prosecuted, after the death of the injured person, for the benefit of the widow and next of kin, and may include compensation for the pain and suffering endured by the injured person as well as for pecuniary loss of earnings and contributions; in other words, compensation for all of the damages resulting from the injury for which the statute provides a remedy inures after the death of the injured person to the benefit of the widow and next of kin, but must be recovered in one action. In the present case no action had been instituted by the injured employee, and plaintiff

> prosecuted only one cause af action, and seeks only one recovery for the various elements of damages for which the statute authorizes a recovery of compensation. There was therefore nothing to call for an election between different causes of action."

The Arkansas Court held in the opinion that both actions could be maintained together, one for pecuniary damage to the beneficiaries and the other for conscious pain and suffering unrelated to any pecuniary damage. The motion to require the plaintiff to elect raises, and the Arkansas Court decided adversely to the Railroad Company, the question whether a survival action under the Ninth Section is open to the plaintiff where the decedent's death was subsequently caused by the injury or where the recovery in the survival action is not based upon, is unrelated to, and is in the case at bar in addition to the recovery of the pecuniary damage to the surviving beneficiaries.

The confusion in the administration of the Federal Employees' Liability Act that must follow such a construction, if adhered to, is readily seen by a review of a few of the recent decisions.

The Conarty case, that at bar, was decided by the Supreme Court of Arkansas, February 3, 1913.

In St. Louis, Iron Mountain & Southern Ry. Co. vs. Sharp, 171 S. W., 95 (Arkansas, November 16, 1914), the action was under the Federal Employers' Liability Act for a death and the decedent lived one day after the injury and died therefrom. He was run over and his leg cut off. The Administratrix "re-

covered $3,000 in favor of the estate and $12,000 for the widow and children."

In St. Louis, Iron Mountain & Southern Ry. Co. vs. Craft (Ark., December 7, 1914), 171 S. W., 1185, the action was for a death under the Federal Employers' Liability Act. The decedent was a brakeman who was run over by a coal car and "lived for something over 30 minutes and suffered great agony." The action was for the benefit of his father to whose support he had made material contributions. Hart, J., explained that:

> "The jury found for the plaintiff in the sum of $11,000 as damages for decedent's pain and suffering, and $1,000 as damages for contributions to his father."

The Supreme Court of Arkansas sustained a judgment entered upon this verdict but reduced the pain and suffering element, by what rule we are not told, to $5,000, and imposed a remittitur accordingly. Hart, J., said:

> "In the case before us, after the decedent was struck by the car, he was compelled to lie face downward for the space of fifteen minutes, and for part of that time a wheel of the car rested upon his body. His suffering was doubtless greatly increased because he could not know how long it would be before he could be removed from under the car and how long it would be before surgical relief could be provided for him. Each additional minute of delay under the circum-

stances added to the horrors of his situation, and he must have suffered almost indescribable agony of mind and body. His body was mangled and his intestines were lacerated and swollen. It is evident that he suffered indescribable anguish, and we are of the opinion that the jury were warranted in finding that he continued to suffer such anguish at least until he had been conveyed a part of the way to the hospital. Thus it will be seen that his suffering continued for more than 30 minutes, and, while we think that the sum of $11,000 was too large an amount to be awarded, we are of the opinion that plaintiff was entitled to recover the sum of $5,000 on that account."

The Supreme Court of Arkansas has disregarded the words of limitation in the Ninth Section which confined the action to the same dependent beneficiaries as are named in the First Section; and has accordingly erected an action for the benefit of the estate unrelated to the pecuniary damage and founded solely on speculation.

In Minnesota there is a recent illustration of the misunderstanding of the State Courts in administering the Federal Employers' Liability Law as to the limitation to pecuniary damage in the Ninth Section. The case referred to is a death action under the Federal Employers' Liability Act, reported as Capital Trust Co. vs. Great Northern Ry. Co., 149 N. W., 14 (Minn., October 9, 1914). In that case the action was for the death of a switchman, Ward, who fell from a moving car and "was run over and died, if not immediately, within ten minutes"—see opinion of Holt, J., at page 15. Later Judge Holt explains that "there

was testimony that Ward, though unconscious, lived some moments after being removed from the train."

In affirming a judgment against the Railway Company, Holt, J., for the Supreme Court of Minnesota, said at page 16:

> "The court instructed the jury that, if they found that he lived an appreciable length of time after the injury, his cause of action survived. The defendant contends that, since Ward 'never regained consciousness and had no conscious period of suffering, there is no reason why the action should survive'; and that 'the theory of a survival of an action is that there was a period of time during which the deceased could have brought an action in his own behalf.' By that, we assume, it is meant that there should have been a physical possibility to begin an action in his behalf before his death. The authorities cited do not support the contention.
>
> "In Kearney vs. Boston & Worcester Ry. Co., 9 Cush. (Mass.), 108, a cause of action was held not to survive where 'it is in evidence that there was only a momentary, spasmodic struggle, and the death instantaneous.'
>
> "In the later case of Hollenbeck vs. Berkshire Ry. Co., 9 Cush. (Mass.), 478, Chief Justice Shaw says:
>
> > "'The accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind, on the part of the sufferer.'
>
> "Chief Justice Bigelow in Bancroft vs. Boston & Worcester Ry. Co., 11 Allen. (Mass.), 34, says:

> " 'The continuance of life after the accident, and not insensibility and want of consciousness, is the test by which to determine whether a cause of action survives.'
>
> " 'If the intestate lived after he was struck, though the time might be brief, the cause of action survived.' Tully vs. Fitchburg Railroad, 134 Mass., 499.

"To the same effect is St. Louis, etc., Ry. Co. vs. Dawson, 68 Ark., 1, 56 S. W., 46; Beeler vs. Butte, etc., Co., 41 Mont., 465, 110 Pac., 528; Kellow vs. Central Iowa Ry. Co., 68 Iowa, 470, 23 N. W., 740, 27 N. W., 466, 56 Am. Rep., 858; Olivier vs. Street Ry. Co., 134 Mich., 367, 96 N. W., 434, 104 Am. St. Rep., 607, 3 Ann. Cas., 53; Ely v. Detroit United Ry. Co., 162 Mich., 287, 127 N. W., 259.

"The case of Dillon vs. Great Northern Ry. Co., 38 Mont., 485, 100 Pac., 960, is not in point for there was a stipulation that death was instantaneous.

"In the case of Kellow vs. Central Iowa Ry. Co., *supra,* the jury answered in the affirmative the question 'was the death of the deceased of that nature commonly known as instant death?' Nevertheless the court held that such finding did not determine that a cause of action did not accrue to him before his death. The deceased was on a railroad train that was wrecked; when found in the wreck he breathed, but died before he could be removed. The court said:

> " 'If he survived the injury but for a single moment, the cause of action accrued to him as certainly as it would have done if he had lived for a month or a year thereafter.'

"One of defendant's witnesses testified that Ward breathed when taken from under the car; Molden's testimony was that when he reached Ward after returning from riding the 'kicked' car into the yard, which consumed about five minutes, he moaned and continued to breathe and live from three to five minutes longer. We think the testimony made the survival of Ward's cause of action a jury question.

"If the jury found that Ward lived an appreciable length of time after the injury, and we conclude the evidence so warrants, it can not be said that the damages are excessive."

The amount of the verdict is not shown in the report, but the last paragraph is a general statement which would be true under the court's theory, no matter how great the amount of the verdict.

The Minnesota Court has borrowed erroneously the analogy of some New England forms of Lord Campbell's Act in which it was held that to maintain an action *at all* the plaintiff must prove survival for some appreciable period of time. Such statutes made the cause of action *for death* dependent upon survival, conscious or unconscious, for some appreciable period. The Ninth Section of the Federal Employers' Liability Act, on the contrary, is intended to cause to survive, with limitation to pecuniary damage to the dependent beneficiaries, that action for conscious pain and suffering which the decedent would have had if he had not, after injury and after conscious pain and suffering, died. The Minnesota Court has mistaken the nature of the survival action

which the Ninth Section of the Federal Act creates and has confused that section with a death action. The death action is already given by the First Section of the Federal Act.

If the decision in the Minnesota case is sound, then there is no such thing, strictly speaking, as an instantaneous death. A reflex action, a quiver, a flicker of an eye-lid, is sufficient to create in every case the right to recover under Section 9 in addition to a recovery under Section 1. Such a development of the law in effect overrules the doctrine announced in Michigan Central R. R. Co. vs. Vreeland, 227 U. S., 59, and a line of cases in which this court has limited recovery under the First Section to pecuniary damages to the beneficiaries.

In Arkansas and in Minnesota the development of the law in administering the Federal Employers' Liability Act is such as to negative the theory of the Act of Congress as shown in first supplementary brief that only pecuniary damage to the named beneficiaries may be recovered and to overthrow the express limitation which Congress set in enacting the Ninth Section which caused to survive a "right of action given by this Act to a person surviving injury."

Respectfully submitted,

THOMAS P. LITTLEPAGE,

Attorney for St. Louis & San Francisco Railroad Company, Plaintiff in Error.

(Note—This additional supplemental brief was not finished until a very short time before the case

was reached and, therefore, counsel for defendant in error has not had an opportunity to consider it and file any reply. Counsel for plaintiff in error most respectfully requests the court to grant leave to counsel for defendant in error to file a reply in case he desires to do so.)

IN THE

Supreme Court of the United States

October Term, 1914.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *Plaintiff in Error.*

v. (23,673)

FANNIE M. CONARTY, Administratrix of the Estate of W. F. CONARTY, Deceased, *Defendant in Error.*

No. 166.

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Plaintiff in error has filed the following, among other, assignments of error:

VII.

"The defendant, not waiving its right under its demurrer, and protesting against being required to answer further, moves the court to require the plaintiff to elect whether she will prosecute her cause of action as administratrix for compensation for the next

of kin, or whether or not she will prosecute the cause of action for the pain and suffering endured by W. G. Conarty on account of the injuries alleged."

Being interested in the question involved, the petitioners request leave of the court to file an additional brief in support of the contention of plaintiff in error.

The cause of action in the above case arose under the Federal Employers' Liability Act of 1908, as amended in 1910.

The act of April 22, 1908, section 1, is as follows:

"Every common carrier by railroad, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States and Territories or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, *or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such empolyee's parents, and, if none, then to the next of kin dependent upon such employee for such injury or death* resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, ap-

pliances, machinery, track, roadbed, works, boats, wharves or other equipment."

On April 5, 1910, Congress amended the act by adding:

"Section 9. That any right of action given by the act to a person suffering injury shall survive *to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.*"

In construing section 1, *supra*, in *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 68, the court said:

"The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds: "Or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death," etc. There is no express or implied limitation of the liability to cases in which the death was instantaneous.

"This cause is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had, one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only.

"The statute, in giving an action for the benefit of certain members of the family of the decedent, is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being—that of 9 and 10 Vict., chap. 93, known as Lord Campbell's act. This act has been, in its distinguishing features, re-enacted in many of the States, and both in the courts of the States and of England has been construed not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death.

* * *

"The distinguishing features of that act (Lord Campbell's) are identical with the act of Congress of 1908 before its amendment. First, it is grounded upon the original wrongful injury of the person; second, it

is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries."

In adopting the amendment of 1910 Congress intended to provide for survival of the employee's right of action, which is a different liability from that imposed by the death act above discussed. In providing that "there shall be only one recovery for the same injury," Congress recognized that otherwise two separate actions might be brought, in case of the wrongful death of an employee, viz., one under the death act, and one under the survival act. An action by the injured party might be pending at the time of his death, caused by the injury. This action would survive. Another action might be subsequently brought for the pecuniary loss to the next of kin.

Similar provisions are found in the statutes of most of the States. In some of them, where there is a survival act as well as a death act, the latter is held to be limited to cases of instantaneous or immediate death, and cases where the death was not instantaneous or immediate are held to fall under the survival statute. This is the construction adopted in Maine and Michigan. *Sawyer* v. *Perry*, 88 Me. 42; *Anderson* v. *Wetter* (Me.), 15 L. R. A. (N. S.) 1003; *Dolson* v. *Lake Shore & M. S. Ry. Co.*, 128 Mich. 444; *Belding* v.

Black Hills & Ft. P. R. Co., 3 S. Dak. 369. In an earlier Michigan case, however, it was said, *obiter*, that the only logical construction is that given by most of the cases; that is, that the survival act applies to cases of negilgent injuries to the person that are not fatal, and that Lord Campbell's act applies to fatal cases." *Sweetland* v. *Chi. & G. T. R. Co.*, 117 Mich. 329, 43 L. R. A. 574.

We infer from the *Vreeland* case, quoted *supra*, that the Supreme Court of the United States will not follow the above cases in so far as they hold that the death act applies only to cases of instantaneous death.

In a number of States it is held that the death acts provide a complete remedy, whether the death is instantaneous or not, if the death results from the injury; but if it results from some other cause, the survival act provides the only remedy. *Holton* v. *Daly*, 106 Ill. 131; *Chicago & E. I. R. Co.* v. *O'Connor*, 119 Ill. 586; *Lubrano* v. *Atlantic Mills*, 19 R. I. .., 34 L. R. A. 797; *McCarthy case*, 18 Kan. 46; *Martin* v. *Missouri Pac. Ry. Co.*, 58 Kan. 475; *Hulbert* v. *Topeka*, 34 Fed. 510.

In Kentucky it is held that an administrator, having a right to sue for a decedent's pain and suffering or to sue under the statute for his death, must elect which he will do, and can not do both. *Conner* v. *Paul*, 12 Bush 144; *Louisville & N. R. Co.* v. *McElwain*, 98 Ky. 700, 56 Am. St. 385, 34 L. R. A. 788; *Hendricks*

v. *American Exp. Co.*, 138 Ky. 704. So, where two actions were begun, the administrator was held to be entitled to elect which he would defend, and plead its pendency in bar of the other. *Henderson* v. *Ky. Cent. R. Co.*, 8 6Ky. 389.

Notwithstanding the divergent views of the courts upon the meaning and effect of the death and survival acts, as we have shown above, *all of the above cases agree in holding that there can only be on action for damages cauesd by the wrongful act of another.* It matters not which view of this statute is taken by the United States Supreme Court, if that court adopts either of the above views, it would follow that the two causes of action can not be combined in this suit.

That the two actions can not be sustained for the same injury, see, further, *McCafferty* v. *Pa. Rd. Co.*, 193 Pa. St. 339, 74 Am. St. 690; *Edwards* v. *Gimbel*, 202 Pa. St. 30; *Fritz* v. *W. U. Tel. Co.*, 25 Utah, 263; *Consolidated Coal Co.* v. *Dombriski*, 106 Ill. App. 641; *Hartigan* v. *Southern Pac. Co.*, 86 Cal. 142; *Munro* v. *Dredging, etc., Co.*, 84 Cal. 515; *Andrews* v. *Hartford, etc., Rd. Co.*, 34 Conn. 57; *Putnam* v. *Southern Pac. Co.*, 21 Ore. 239; *Legg* v. *Britton*, 64 Vt. 652; *Littlewood* v. *New York*, 89 N. Y. 24.

It is held in California that there can be but one action and one recovery of damages for the death of a person. If the action is maintained and a judgment recovered by his widow, his posthumous child, born

after such recovery, and whose existence was unknown to the defendant in the action, can not maintain a further action on the ground that he was conceived before such former action was commenced, though the statute of the State declares that a child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent death. *Daubert* v. *Western Meat Co.*, 96 Am. St. 154, 139 Cal. 480.

"Where the plaintiff, in an action for personal injuries, dies from such injuries pending the action, and his administrator recovers judgment therein, such judgment is a bar to an action by the administrator or the beneficiaries for the death by wrongful act." 13 Cyc. 327.

There are cases which hold that, in case of a wrongful death, two separate actions might be brought by the administrator, one for the benefit of the estate and the other for the benefit of the widow and next of kin. *Bowes* v. *Boston*, 155 Mass. 344; *Davis* v. *Railway*, 53 Ark. 117; *Mahoning Valley R. Co.* v. *Van Alstine* (Ohio), 14 L. R. A. (N. S.) 893; *Stewart* v. *United Electric Light & Power Company* (Md.), 8 L. R. A. (N. S.) 384.

With reference to the above four cases, the Massachusetts case cites no authority. The Arkansas case quotes extensively from *Needham* v. *Railway*, 38 Vt. 294. In fact, much of the phraseology and reasoning

of the opinion in the Davis case is taken from the Vermont case. Subsequently, the Vermont court decided that the Needham case, so far as this point is concerned, was *obiter dictum*, and erroneous.

Where the injured person began a suit in his lifetime which his administrator prosecuted to judgment after his death, the Vermont court held that the judgment barred a second suit for the benefit of the widow, although the damages awarded in the first suit were solely for the injuries to the deceased in his lifetime. *Legg* v. *Britton*, 64 Vt. 652.

In that case the intestate was injured by the unlawful act or neglect of the defendant. He brought suit to recover therefor, and died, pending the suit, from the injury so received. The administrator prosecuted the suit to final judgment, which was satisfied, and subsequently brought a second suit to recover for the widow and next of kin the pecuniary injury resulting to them from the death of the intestate. Defendant pleaded the former judgment in bar. In reaching the conclusion that the second suit was barred, the court held that the statute providing for the recovery of damages for benefit of the widow and next of kin, where death results from the neglect or default of a person, does not create a new and additional cause of action in favor of such beneficiaries, but provides a new class of damages in case a right of action would have existed in the deceased person if living, and hence

that, if this right of action were extinguished in intestate's lifetime, no further recovery could be had after his death.

The Ohio case cites *Davis* v. *Railway, supra,* and *Brown* v. *Chicago & N. W. Rd. Co.* (Wis.), 44 L. R. A. 579, and relies principally upon the argument that the two causes of action are distinct and in separate rights. The Brown case merely decides that the two causes of action are separate and distinct. On page 584, the Wisconsin court said: "Of course, there can be no question as to whether a recovery on one claim will bar an action for the other; therefore, what is said should not be taken as deciding that question."

The Maryland court cites authorities, English and American, to the effect that the death and survival actions are separate and distinct. Nearly all of the authorities, English and American, are to that effect.

The question is whether the Legislature intended that two actions should be prosecuted for the same injury. The highest court of England applied the maxim, "*Nemo debet bis vexari pro una et eadem causa,*" in a recent case. *Wood* v. *Gray,* 1892, A. C. 576. See concurring opinion of Field, J. This is the principle which controls the courts, which hold that only one action can be brought for an injury resulting in death. None of the cases above cited, which hold that two actions may be prosecuted concurrently, meet this argument.

Before the case of *Davis* v. *Railway*, 53 Ark. 117, was decided, the question whether two actions would lie in this State for an injury which caused death came before the Federal circuit judges.

In construing the Arkansas statute, Sanborn, J., in *St. Louis, etc. Ry. Co.* v. *Needham*, 10 U. S. App. 339, 52 Fed. Rep. 371, said: "It gives 'an action' a single action, not several actions, for the wrongful killing. It provides that every such action must be brought in the name of the personal representatives, if there are such; otherwise, by the heirs-at-law. It will not be gravely insisted that the personal representatives could maintain more than a single action, or that, where there are several administrators, one of them could maintain the action without joining all; and it is equally clear that when the action is brought by the heirs there must be but a single action, and all the heirs must be made parties to it, so that the entire controversy may be determined and the entire amount recovered and distributed in the single action given by the statute. The simplicity and effectiveness of such an action, the inconvenience and injustice to the plaintiffs and defendants alike resulting from any other practice; the rule of distribution of the amount recovered, based not upon the injury to each person entitled to receive a share, but upon the statute of descents; the settled rule of law as to parties jointly interested in a case of action, and the plain reading of the statute,

compel the conclusion that such was the intention of the Legislature."

In *Louisville & N. R. Co.* v. *McElwain,* 98 Ky. 385, it was held that where a wife was killed by the negligence of a railroad company, a recovery by the husband, as personal representative, of damages, under a statute allowing a right of action for a personal injury to survive to the personal representative, is a bar to his common-law right of action, as a husband, to recover damages for the loss of his wife's society from the time of the injury until her death. The court said: "We can not believe that the General Assembly intended that the personal representative should maintain an action for the death of the wife, practically for the husband's benefit, and allow at the same time the husband to maintain one on his own account, for the same acts or negligence. * * * It was not the intention of the Legislature to multiply actions. The husband must accept the benefit which the statute secures him in lieu of those he possessed at common law." Compare the somewhat similar case of *McGovern* v. *N. Y. C., etc. R. Co.,* 67 N. Y. 417.

In Pennsylvania the two statutes—the survival act and the death act—are found. The court said: "Under these acts two actions can not be sustained for the same injury." *McCafferty* v. *Pa. Rd. Co.,* 193 Pa. St. 339, 74 Am. St. 690.

In *Sawyer* v. *Perry*, 88 Me. 42, in construing the act of 1891, c. 124, similar to Lord Campbell's act, to give a remedy where an injured person dies immediately, a case not covered by the survival statute, the court said: "The court could not believe that the Legislature intended to give two remedies for a single remedy. It had become settled law in this State that if a person was injured through the negligence of another person, or a corporation, and afterward died of his injuries, redress could be obtained by his personal representative. But it has been held in Massachusetts (and the law was assumed to be the same in this State), that, if the person injured died immediately, no redress could be had. And it was believed that it was the intention of the Legislature to remedy this defect—not to give a new right of action where ample means of redress already existed, but to supplement the existing law, and give a new right of action in a class of cases where no means of redress already existed. And it was believed that full effect would be given to the legislative intention by limiting the new right of action to cases where the persons injured died immediately."

All of the cases which hold that there can be only one action for damages caused by the wrongful act of another, whether they hold that the survival statutes applies in every case where death is not instantaneous, or that the death act provides the only remedy save where death results from some cause other than the

injury, or that th administrator must elect which suit he will bring, are based upon the idea that it was not the legislative intent that the defendant should be harassed with two actions growing out of the same injury.

It was expressly so provided by Lord Campbell's act, section 3 of which is as follows:

"Sec. 3. Provided, always, and be it enacted, that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person."

In *Wood* v. *Gray*, 1892, A. C. 576, a workman, having been injured through fault of his employers, brought an action against them for damages. While the action was pending, he died, intestate and unmarried. His mother was appointed his executrix, and she raised a second and concurrent action for *solatium* for her son's death, and asked that the second action should be remitted to the same jury who were to try the first action. *Held*, that the second action was incompetent.

After holding that, under the Scottish law, the first action survived, Lord Watson said:

"To my mind, the only relevant question in the present case is, has the rule ever been carried so far as to recognize the competency of an action at the instance of relatives, where an action, in respect to the same injuries, has been raised by the deceased during his

lifetime, and is still a depending litigation? Unless that question can be answered in the affirmative, the appellant's action is, in my opinion, incompetent.

"There is no case to be found in the reported decisions of the Court of Session in which an action by relatives was sustained after the deecased's claim had been settled or extinguished by an adverse judgment, or where he had raised an action which passed to or might be insisted in by his executor; and the existence of such a right of action has not been affirmed, or even suggested, by any text writer. There is not a single instance in which the court has allowed two actions to be brought in respect of the same negligent act, leading to the injury and death of one person. Even in cases where the right of relatives to sue has been recognized, they must bring one suit, and one only, in which the damages due to them respectively may be assessed."

It would seem that the amendatory section 9, adopted by Congress in 1910, should be construed in view of section 3 of Lord Campbell's act as construed by the House of Lords in *Wood* v. *Gray, supra,* and of the holding of the highest courts of a large majority of the States. In providing that "there shall be only one recovery for the same injury," Congress did not contemplate that the two causes of action should be combined in one suit, as is the approved practice in Arkansas and a few other States, but that only one cause of action should lie for an injury resulting in death.

An additional reason for the construction for which we contend appears from consideration of the language of the original statute and the amendatory statute with reference to the beneficiaries of the action.

In *Gulf, etc., R. Co.* v. *McGinnis,* 228 U. S. 173, in construing the Employers' Liability Act of April 22, 1908, the court used the following language, viz.:

"The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. *That apportionment is for the jury to return.* This will, of course, exclude any recovery in behalf of such as show no pecuniary loss." See also *Louisville & N. R. Co.* v. *Stewart's Adm'r,* 156 Ky. 550.

The original act of April 22, 1908, provides that in case of the death of an employee the carrier shall be liable "to his or her personal representative *for the benefit of the surviving widow or husband or children of such employee; and, if none, then to such employee's parents; and, if none, then of the next of kin dependent upon such employee,* for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, etc." The amendatory act of April 5, 1910, providing for a survival of the cause of action for personal injuries, pro-

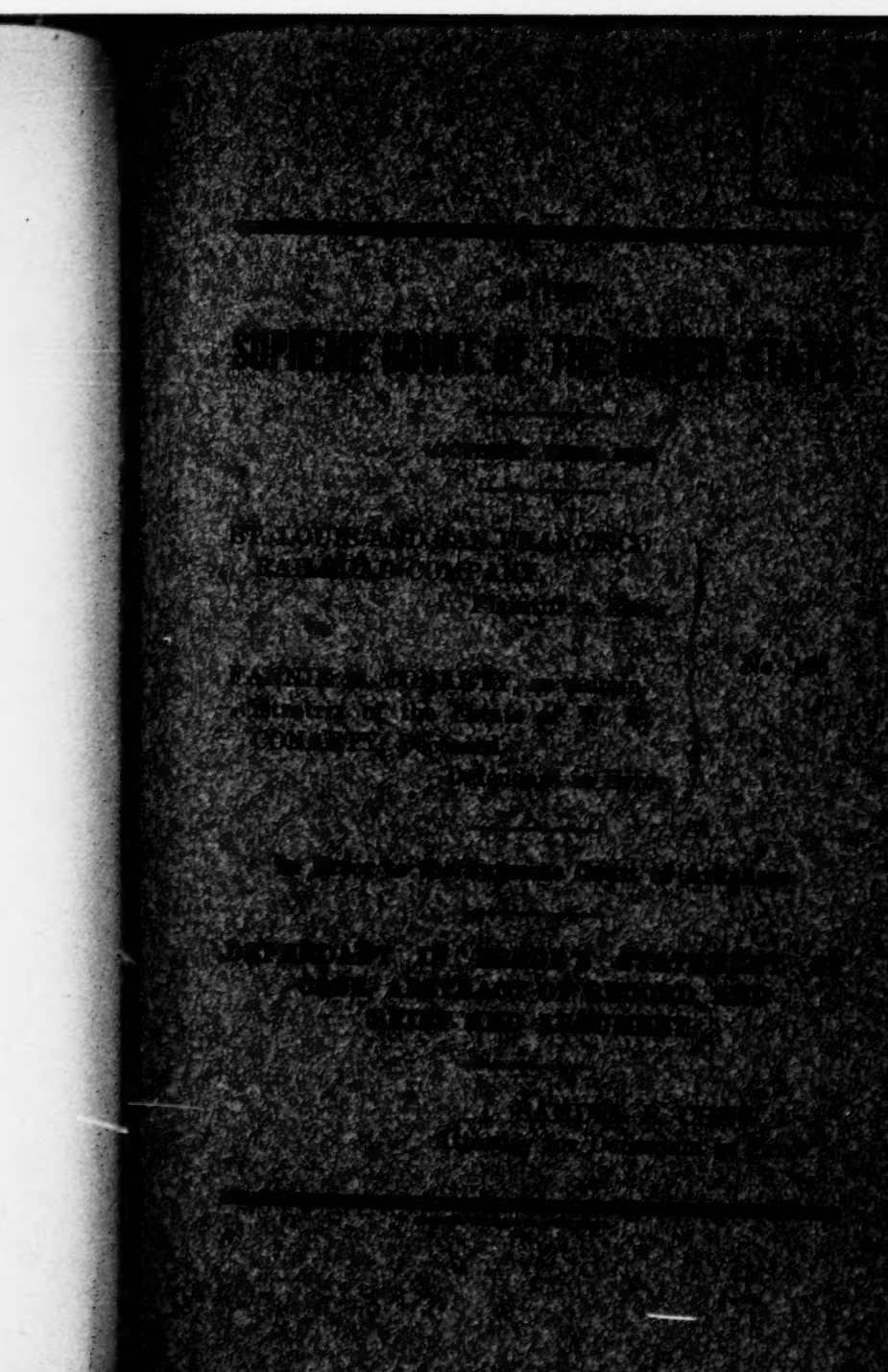
vides that this right of action shall survive "*for the benefit of the surviving widow or husband and children of the employee; and, if none, to the next of kin dependent upon such employee,* but in such cases there should be only one recovery for the same injury." In the McGinnis case the quotation which we have given shows that the recovery for each beneficiary under the original act is measured by his or her individual pecuniary loss. The very same language is found in the amendatory act. There is nothing whatever in the amendatory act which indicates that the provision for the recovery of the individual pecuniary loss shall be cumulative to the recovery for the same loss under the original act. If, by the verdict of a jury, a dependent beneficiary received the amount of his individual pecuniary loss, under the act of 1908, why should he be permitted to recover for the same pecuniary loss under act of 1910? Manifestly, the jury should not be permitted to make a double allowance in two separate causes of action for the same pecuniary loss.

Respectfully submitted,

EDWARD J. WHITE,

E. B. KINSWORTHY,

Amici Curiae.



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Western Coal & Mining Co. vs. Berberich, 36 C. C. A., 368;

Yazoo & M. V. R. Co. vs. Wright, 207 Fed., 281.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Plaintiff in Error,
vs.
FANNIE M. CONARTY, as Administratrix of the Estate of W. F. CONARTY, Deceased,
Defendant in Error.

No. 166

In Error to the Supreme Court of Arkansas.

DEFENDANT IN ERROR'S STATEMENT OF CASE, ABSTRACT OF RECORD, AND BRIEF AND ARGUMENT.

We are not satisfied with the statement of this cause made by plaintiff in error. Therefore, we submit the following as a true statement from the record:

DEFENDANT IN ERROR'S STATEMENT OF THE CAUSE

This action was brought to the June, 1912, term of the Crawford Circuit Court in the State of Arkan-

sas for the purpose of recovering of plaintiff in error damages alleged to have been sustained by the widow and children of the deceased as his only heirs at law. The cardinal averments of the complaint read as follows, to-wit:

"Comes the above-named plaintiff, as administratrix of the estate of W. G. Conarty, deceased, complaining of defendant, St. Louis and San Francisco Railroad Company and says,

That W. G. Conarty departed this life in the city of Fort Smith, Sebastian County, Arkansas, * * * on the 19th day of Nov., 1910, dying intestate, leaving surviving him his widow, Fannie M. Conarty, thirty-four years of age, in good mental and physical health, and the following named children as his only heirs at law, to-wit: Virginia, a daughter, three years of age, Jack, a son, seven years of age, and Elmore, a son, nine years of age, who are all in sound mental and physical health.

That said W. G. Conarty, deceased, at the time of his death was thirty-eight years of age, in sound mental and physical health. * * * And plaintiff says that at the time of the death of her said intestate he was earning as much as $1,500.00 per year * * * that out of said sum he was contributing as much as $1,200.00 per year towards the care, comfort, support, and maintenance of the said Fannie M., Virginia,

Jack, and Elmore Conarty, his widow and children as aforesaid, and that had he lived he would have continued to so contribute said sum of money from month to month and year to year towards their said care, comfort, support, and maintenance. * * * And plaintiff says that the defendant, St. Louis and San Francisco Railroad Company, is now and was on the days and dates hereinafter mentioned a corporation * * * and as such said corporation it is now and was on said days and dates the owner, operator, and manager of a line of railroad in and through a part of the States of Texas, Oklahoma, Arkansas, and Missouri * * * and had under its control and in its possession a number of freight cars and steam locomotives with and by which it was on said days and dates over its said line of railroad engaged in the business of moving and transporting freight, merchandise and property out of said State of Missouri, into and through a part of the State of Arkansas, and into a part of said States of Oklahoma and Texas. * * * And plaintiff says the defendant is now and was on said days and dates the owner, operator, and manager of a system of railroad tracks and side-tracks in the City of Fort Smith in the State of Arkansas. * * * That in, upon, and over said tracks and side-tracks it caused cars loaded with merchandise, property and freight that was then and there being moved by defendant over its line of railroad into and

through a part of said States of Texas, Oklahoma, and Missouri, and out of a part of said States into the said State of Arkansas, to be assembled, gathered, and congregated for the purpose of being distributed and constructed into its trains for movement over its said line of railroad to different points in said States of Texas, Oklahoma, and Missouri, and other states of the Union. That in, upon, and over its said line of tracks and said side-tracks in said City of Fort Smith it caused a part of its said cars to be switched and moved with a part of its said locomotives for the purpose of constructing them into trains to be moved and hauled by it over its said line of railroad into a part of said States out of said State of Arkansas. * * * That on and prior to the 13th day of November, 1910, her said intestate W. G. Conarty was in the employ of the defendant as switchman or brakeman in defedant's said yards in said City of Fort Smith and that in the discharge of his duty as said switchman or brakeman towards the defendant it became and was necessary for him with one of said locomotives to assist in moving and switching cars loaded with merchandise that had been brought by defendant over its said line of railroad into said yards into trains to be hauled by defendant over its said line of railroad into and through a part of said States of Texas, Oklahoma, and Missouri and to switch and place cars that had been brought by defendant into said yards loaded

with merchandise property and freight out of a part of the said States of Texas, Oklahoma, and Missouri so that said cars might be unloaded.

And plaintiff says that on the 13th day of November, 1913, while her said intestate, W. G. Conarty was so in the discharge of his duty as said switchman or brakeman and while at his post of duty upon the foot-board of one of defendant's said locomotives which was then and there being moved by defendant over said tracks in said yards * * * for the purpose of switching, moving, and hauling cars loaded with freight, property, and merchandise that had been brought by defendant into said yards over its said line of railroad out of said State of Missouri, destined to points in said States of Texas, and Oklahoma.

And plaintiff says that while her said intestate, W. G. Conarty, was so upon said foot-board in the discharge of his duty towards the defendant, and while said locomotive was being moved for the purpose of so distributing the said cars and switching them into a train to be moved by defendant over its said line of railroad out of said State of Arkansas into and through a part of the said States of Oklahoma and Texas he was by and through the carelessness, negligence, wrongful and unlawful conduct of the defendant as hereinafter set forth and complained of caused to be caught between the front end of said locomotive and an end of a certain coal car, said coal

car being then and there loaded with freight, merchandise, or coal destined from some point on defendant's said line of railroad in the State of Arkansas to some point in the State of Texas. * * * And plaintiff says that by reason of said intestate being so caught between said locomotive and said coal car he was caused to be greatly and painfully bruised, mashed, and crushed in and about his head, arms, chest, legs, and face, his muscles and nerves to be greatly and painfully torn, bruised, and lacerated, the bones in and about his face, head, body, and limbs to be crushed and broken, so as to cause and ultimately bring about his death. Plaintiff says that her said intestate by reason of said injuries so received was caused and compelled to take his bed on said 13th day of November, 1910, and to languish in great mental and physical pain until the 19th day of November, 1910, on which last named date her said intestate died from said injuries and wounds so inflicted upon him. * * * That from said 13th day of November, 1910, until the 19th day of November, 1910, her said intestate consciously and knowingly suffered great mental and physical pain * * * all of which plaintiff says was and is to the great damage of plaintiff's said intestate's widow and children in the sum of One Hundred Thousand Dollars. Plaintiff says that said negligence, carelessness, wrongful management, and unlawful conduct of the defendant consisted in this, to-wit:

That it negligently, wrongfully, carelessly, and in violation of the laws and acts of the Congress of the United States, allowed and permitted said coal car so loaded with coal as aforesaid to be hauled and used on its said main line and side-tracks in said yards in said City of Fort Smith, and allowed and permitted said coal car, so loaded with coal as aforesaid, to be hauled and used, placed, switched and moved upon its said main line track and said side-tracks in said yards in said City of Fort Smith, while and when said coal car, so loaded with coal as aforesaid, was not then and there equipped with a coupler that would couple onto or with said locomotive or onto and with another car automatically by impact, and while said coal car, so loaded with coal as aforesaid, was not then and there equipped with a drawbar measuring 31½ inches perpendicular from the level of the tops of the rails in said tracks to the center of said drawbar; said railroad being then and there a standard gauge railroad in its tracks. That said defect in said coal car so loaded as aforesaid was in or on the end of said car next to the approach of said locomotive upon which her said intestate was then and there so upon as aforesaid; that said end of said coal car was without a coupled or drawbar of any kind; that the draft timbers in said end of said car were broken down and torn out so that a coupler and drawbar that would couple automatically by impact with said locomotive

or another car, could not and was not kept and maintained in said car as the said act of Congress directs.

And plaintiff says that by reason of said negligence, carelessness, wrongful management and unlawful conduct of said defendant, as aforesaid, and while said coal car was so upon said main line track, the said locomotive upon which her said intestate was then and there so upon, as aforesaid, ran into and collided with the said defective end of said coal car, thereby causing her said intestate to be caught between the said end of said coal car and said locomotive, and injured as aforesaid."

Prayer for judgment for alleged damages and cost for the use and benefit of said widow and children.

P. R. pp. 1-4.

To this complaint there was no demurrer. Before filing its answer plaintiff in error filed petition and bond to remove this cause to the Federal Court, which motion was overruled, to which ruling plaintiff in error excepted.

P. R. pp. 8-9.

Plaintiff in error then filed its answer in which it did not deny its being a corporation and as such was the owner of a line of railroad, the track and yards in Fort Smith, and that it was the owner of the loco-

motives and cars, and that it was engaged in the carriage of merchandise and property between the states mentioned and did not deny that it used said yards and tracks in Fort Smith for the purpose of congregating its cars and constructing them into trains for moving merchandise out of Arkansas into Missouri, Texas, and other states, but denied all other allegations and in a general way pleaded assumed risks and contributory negligence upon the part of deceased, W. G. Conarty.

P. R. pp. 5-7.

Upon the issues thus raised this cause went to trial before a jury who determined the issues of fact for defendant in error. We are not at all satisfied with plaintiff in error's abstract of the evidence; we, therefore, submit in addition the following as it appears of record.

DEFENDANT IN ERROR'S ABSTRACT OF THE EVIDENCE

MR. S. P. HAAS testified:

I am division freight agent of the St. Louis and San Francisco Railroad, at Fort Smith. A car branded N. O. & N. E. and numbered 13239 came into the yards at Fort Smith, Arkansas, on the 9th day of Nov., 1910. It was loaded with coal. The car was in bad order. It was billed from Huntington, Ark., destined to some point in Texas. This car was forwarded from Fort Smith to Paris, Texas, on the 19th day of Nov., 1910. It was loaded with same coal when it was forwarded that it was loaded with when it came in. The St. Louis and San Francisco Railroad was handling freight on the 12th and 13th days of Nov., 1910, in box and coal cars out of the State of Missouri into the States of Arkansas, Oklahoma and Texas.

P. R. pp. 11-12.

LEE ARMSTRONG testified:

I knew W. G. Conarty. He was employed by the St. Louis & San Francisco Railroad in November, 1910. He was under my supervision. I was night yard master. I was working there on the 13th day of Nov., 1910. The yards are three miles long. It runs east and west. There were two crews working there in the yards—used two engines. I do not know

how long Mr. Conarty had been employed there. He was working there when I came there in November, 1908. On the 13th of Nov., 1910, I saw a car branded N. O. & N. E. and numbered 13239. It was loaded with coal. When I first saw this car that night the engine we call the outside engine had it, coming up the main track. The engine was in charge of Fore-.nan Hetherington. When I saw this car at that time it was about four blocks from where Mr. Conarty got injured. It was before he was injured when I first saw this car. The car when I first saw it was in a cut of about fourteen cars. This cut of cars passed me between H and I streets and Mr. Conarty was hurt between E and F. The cars passed me fifteen or twenty minutes before Mr. Conarty was hurt. **Part of this cut of cars were loaded. I do not know how many were loaded. The freight in the cars was destined to points outside of the State of Arkansas, east and west.** I do not know when this defective car branded N. O. & N. E. and numbered 13239 got into the yards. I know it was on No. 2 track on the 10th of November. It was on this track when we got it the night Mr. Conarty got hurt. It was mixed up with other cars. This coal car 13239 was defective in its west end—the end up the river. **The defects were the drawbar was gone, and the draft timbers were gone. When I speak of a drawbar I mean the coupler.** The coupler is the connection from one car to another. The coupler is constructed of iron and is like a

knuckel When the coupler is in good fix they will couple with cars automatically; that is, when the cars come together they will couple themselves if the couplers are in good fix. The west end, or up the river end of this car had no such thing as a coupler on it. There were five or six of the cars in the cut of cars that were loaded with freight destined to points outside of the State of Arkansas. The next time I saw this coal car that night was after Mr. Conarty got hurt. It was standing on the main line track just east of F street. I have been switching for railroads about fourteen years. Have been handling automatic couplers ever since they have been in use, about twelve years. The locomotives we were using there that night were equipped with automatic couplers. **If the coal car had been equipped with a coupler that would have coupled automatically it would have coupled on to the locomotive when the locomotive was moving at a speed of four or five miles per hour. The space between the foot-board on the end of the engine and the end of the car when coupled together is about two feet, room for a man to stand there. Space for a man to protect himself.** Engines running at four or five miles per hour are often coupled on to cars with a man standing on the foot-board. Mr. Conarty at the time he got hurt was a switchman. His post of duty was next to the drawhead on the foot-board. Take the stand I am sitting upon as the front end of the engine and my feet to represent the draw-

bar, and this pedestal the foot-board, and my feet to represent the coupler. Mr. Conarty's post of duty was on the right hand side of that foot-board. He is required to stand there to couple and uncouple the engine from the cars. I saw Mr. Conarty that night after he was injured. He was lying on the ground five or six feet from this coal car. The coupler on the engine was in first class condition. It had been used that night. I found blood on the front end of the engine. There were some bolts protruding from the end of the coal car. If there had been a drawbar on the end of this coal car, and the engine had struck it at from four to seven miles per hour the car, if the knuckles had been closed, the car would rebound; that is, move on the rails from the engine and leave a space between the foot-board and end of the car so that a man would be safe on the foot-board.

P. R. 15-23.

On re-direct examination of this witness he testified:

That the point at which the engine collided with the coal car, and where Mr. Conarty was hurt, was eight hundred and fifty yards west of where the coal car would have been in the clear on the repair track. This coal car that hurt Mr. Conarty had been moved on the main line track from where it was taken off the side track about three-quarters of a mile before

the collision took place. In moving this car this distance it had passed the repair track about four hundred yards. The defective end of the coal car was the end which Mr. Conarty ran into that caused his death. Mr. Conarty had been in the west end of the yard to clear the track in order to make room for a freight train that had come in from the east, bound for Texas.

P. R. 25-29.

W. J. DANIELS testified:

I knew Mr. W. G. Conarty. Worked with his in the yards at Fort Smith from July to November, 1910. **At the time Mr. Conarty got hurt he was at his post of duty.** Just before Mr. Conarty got hurt we had been up to shift some cars to be unloaded. **These cars had come in from the north on local and through freight trains.** We spotted the cars and came down the main line track. **The locomotive we were using handled cars in the yards that came in from other states. It was used in making and breaking up trains. At the time we were coming down the main line track we were going to make up a fast run freight train of merchandise that ran between St. Louis, Mo., and Paris, Texas.** We were moving on the main line track that is a standard track four feet, eight and a half inches wide. **Mr. Conarty's post of duty was on the foot-board in the middle of the track.** Mr. Douglass was on the foot-board between the end of the board

and Mr. Conarty. As we came down the main track we collided with a loaded coal car standing on the main line track. After the accident I went around to the front end of the engine. Mr. Conarty was laying across the pilot beam at the front end of the engine, his shoulder was on the cylinder and his face on the steam chest. The engine was moving six or seven miles per hour, but when the collision took place the speed had been reduced a good dead. We lifted Mr. Conarty off the beam and laid him down on a cushion. He was bleeding freely at the mouth. Had several holes punched in his legs. They must have been punched by the bolts in the car. The blood was running in a stream from his mouth. He was put in an ambulance.

The car was loaded with coal and was branded N. O. & N. E. The engine was equipped with an automatic coupler. It was in good condition. **There was no coupler in the end of the car we collided with. If the coal car had had a drawhead in it, and in good order, the collision would not have had any effect.** If the knuckle had been open it would have coupled. **If the knuckle had been closed it would have shoved the car away from the engine when it struck.** Couplings are frequently made with men standing on the foot-board. It is an every day occurrence. Mr. Conarty was an industrious and energetic man and appeared to be in good health.

P. R. pp. 30-38.

On re-direct examination this witness testified:

A man is put on the foot-board to see that the knuckle is open.

P. R. p. 42.

GEORGE LINDSAY testified:

I was living in Fort Smith in November, 1910, working at Arkansas Cotton Oil Mill situated on Frisco tracks, on the night of the 12th of November, 1910. I was watchman at the mills that night. I saw a switch engine going towards the river. There was a box car and coal car on the main line track. The coal car was closer to the engine. It was on south end of the box car. I heard a noise. I thought they did not strike the drawbar. I noticed the coal car after the collision. After the cars struck they moved about the length of the coal car.

P. R. pp. 45-48.

MRS. FANNIE CONARTY testified:

I am thirty-six years of age. Am in good health. Am the administratrix in this action. I am the widow of Mr. Conarty. He was thirty-six years of age, in good health. I have three children by Mr. Conarty. Elmore, ten years of age; Jack, seven, and Virginia, four years of age. Mr. Conarty was a strong, energetic, and industrious man. He worked all the time.

We were married in 1900. Mr. Conarty's check varied. The last check he gave me was for two weeks' work it was for 73 or 74 dollars. He contributed money to me and the children every two weeks. I learned of his injury about five o'clock on the morning of the 13th of November, 1910. Mr. Conarty was very much interested in the children, as much so as a father could be. As soon as I heard of his injury I went to him. When I reached him his head was bandaged, his eyes closed, jaws broken and his skull fractured. I went to him and asked him if he knew me. He said, "Yes, it is May, my wife." I stayed with him from Sunday until Wednesday. He appeared to be suffering intensely, and understood everything. I went back to him and on Thursday evening he said, "I believe I feel better," and "Why didn't you bring the children, don't you know I want to see them?" He suffered all the time, and Thursday, he said, "I am a mighty sick man and unless I get better soon I won't be here much longer." He died about one o'clock Saturday afternoon, on the 19th of November. During the last year of his life he contributed to our support as much as $120.00 to $130.00 per month.

P. R. pp. 50-54.

MR. I. B. CLIFF testified:

I was employed by defendant in November, 1910. Was acquainted with W. G. Conarty. Had known

his a year or more. I was light repair man in the yard. It was the car inspector's duty to see after the bad order cars in the yard.

P. R. pp. 55-56.

JOHN LAKE testified:

I was a brother-in-law to Mr. Conarty. I had known him about thirty years. He was a hard-working, industrious man and in good health. I saw him Sunday night after he was injured that morning. He was conscious at that time and seemed to suffer a great deal. Time after time we had to hold him in bed. I cashed one of his checks from the railroad the day he died. It was for about $80.00.

P. R. pp. 56-59.

MRS. CONARTY, recalled, testified:

I handled my husband's check for October, 1910. It was for 133 or 135 dollars.

P. R. pp. 63-64.

Mrs. Conarty further testified that when Mr. Conarty was not working for the railroad he worked other places, for the Sand Company, and at the carpenter's trade, and anything to be at home with his family.

P. R. p. 88.

This cause is predicated upon the following acts of Congress which for the convenience of the Court we print herein in full. So far as applicable here they read as follows, to-wit:

"AN ACT TO PROMOTE THE SAFETY OF EMPLOYEES AND TRAVELERS UPON RAILROADS BY COMPELLING COMMON CARRIERS ENGAGED IN INTERSTATE COMMERCE TO EQUIP THEIR CARS WITH AUTOMATIC COUPLERS AND CONTINUOUS BRAKES AND THEIR LOCOMOTIVES WITH DRIVING-WHEEL BRAKES, AND FOR OTHER PURPOSES.

* * * * *

"Sec. 2. **(Automatic couplers required on all cars.)** That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Sec. 6. **(Penalty for violation of law—recovery.)** That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act shall be liable to

a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violation as may come to its knowledge."

* * * * * *

"Sec. 8. **(Employees injured by non-complying cars, etc., do not assume the risk.)** That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

Act of March 2, 1893, ch. 196,

27 Stat. L., 531; 29 Stat. L., 85; 27 Stat. L., 532.

"(Sec. 1.) **(Liability of railroads for injuries to employees.)** That every common carrier by railroad

while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, railroad, works, boats, wharves, or other equipment.

* * * * * *

"Sec. 3. **(Contributory negligence of employee.)** That in al actions hereafter brought against any such common carried by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: **Provided,** That no such employee who may be injured or killed shall be held to have been guilty of contributory

negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"Sec. 4. **(Assumption of risk of employment.)** That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Act of April 22, 1908, ch. 149, 35 Stat. L. 65-66.

AN ACT TO AMEND AN ACT ENTITLED "AN ACT RELATING TO THE LIABILITY OF COMMON CARRIERS BY RAILROAD TO THEIR EMPLOYEES IN CERTAIN CASES," APPROVED APRIL TWENTY-SECOND, NINETEEN HUNDRED AND EIGHT.

(Sec. 1.) **(Liability of railroad common carriers to employees—time limit of actions—jurisdiction—concurrent jurisdiction of state courts.)** That an Act entitled: "An Act relating to the liability of common carriers by railroads to their employees in certain cases," approved April twenty-second, nineteen hun-

dred and eight, be amended in section six so that said section shall read:

* * * * * *

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Sec. 2. **(Survival of actions in case of death.)** That said Act be further amended by adding the following section as section nine of said Act:

Sec. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

Act. of April 5, 1910, ch. 143, 36 Stat. L. 291.

AN ACT TO SUPPLEMENT "AN ACT TO PROMOTE THE SAFETY OF EMPLOYEES AND TRAVELERS UPON RAILROADS BY COMPELLING COMMON CARRIERS ENGAGED IN INTERSTATE COMMERCE TO EQUIP THEIR CARS WITH AUTOMATIC COUPLERS AND CONTINUOUS BRAKES AND THEIR LOCOMOTIVES WITH DRIVING WHEEL BRAKES AND FOR OTHER PURPOSES," AND OTHER SAFETY APPLIANCE ACTS, AND FOR OTHER PURPOSES.

Sec. 4. **(Penalty for violation—hauling defective cars for necessary repairs—risk of carrier—use of chains limited.)** That any common carrier subject to this Act using, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: *Provided,* That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest

available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

Sec. 5. **(Liability for hauling defective cars except for repairs.)** That except that, within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be

unlawful, nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties and requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this Act."

Act of April 14, 1910, ch. 160, 36 Stat. L. 299.

BRIEF AND ARGUMENT

Plaintiff in error did not in its answer deny that on the 13th day of November, 1910, the day defendant in error's intestate received the injuries that caused his death it was engaged in the carriage of interstate commerce, and did not deny that said intestate was employed by it as a switchman or brakeman in its yards at Fort Smith, and did not deny that it was the owner of a railroad yard in said Fort Smith. It did, however, deny that it caused cars loaded with merchandise, property, and freight that were being by it moved over its line of railroad through Arkansas, into Texas, Oklahoma, and other States, to congregate and be assembled in said yards to be distributed and constructed into trains to be by it moved over its line of railroad to different points in the States of Texas, Oklahoma, and other States of the Union, and denied that it was defendant in error's intestate's duty to assist in switching cars loaded with merchandise that had been brought by it over its line of railroad into trains to be by it hauled into Texas and other states, and denied that said intestate was at his post of duty upon the foot-board of the locomotive for the purpose of distributing said cars into trains to be moved by it into Texas and other states.

The issue thus raised and settled left only the burden on defendant in error to prove that said yards

were so used and that it was said intestate's duty to assist in switching cars in said yard into trains to be by plaintiff in error hauled over its line of railroad into other states. She accepted this burden and proved it beyond cavil or dispute by the evidence of witness Haas who testified that the coal car in question came into the yard at Fort Smith on the 9th day of November, 1910, loaded with coal, billed our from Huntington, Arkansas, a point on plaintiff in error's line of railroad, to some point in Texas; that said car was in bad order, and the evidence of witness Armstrong, the night yard master under whom said intestate was working in said yards, who testified that intestate's post of duty was on the foot-board; he was required to stand there to couple and uncouple the engine from the cars, and by the evidence of witness Daniels, who testified that at the time intestate got hurt he was at his post of duty; that just before intestate got hurt they had been up to shift some cars to be unloaded; these cars had come in on local and through freight trains. "We spotted the cars and come down the main line track. The locomotive we were using handled cars in the yards that came in from other states; at the time we were coming down the main line track we were going to make up a fast run freight train of merchandise that ran between St. Louis, Missouri, and Paris, Texas. Intestate's post of duty was on the foot-board." This evidence is nowhere questioned or contradicted. We,

therefore, urged and submit that it established the fact that the yards were used for the purpose of constructing cars into trains to be hauled over plaintiff in error's track from Fort Smith, Arkansas, to Paris, Texas, and that when intestate was injured by the non-law-complying coal car he was in the discharge of his duty to plaintiff in error as a switchman in said yard, and, that at the time he was so injured he was engaged in an act of interstate commerce, because the proof shows not only that he had just spotted some cars that had come in the yards on through freight trains, but was at the time of the injury moving over the main line track in said yards with a locomotive for the purpose of making up a fast freight train of merchandise between St. Louis and Paris, Texas. These facts proved beyond dispute that intestate at the time of being injured was at his post of duty and that he was employed in interstate commerce.

This Court speaking through Mr. Justice Pitney has held that a fireman who had inspected, oiled, and fired an engine preparatory to moving a train which had in it interstate cars, although the fireman had temporarily left the train for the apparent purpose of going to his boarding house, was engaged in interstate commerce.

North Carolina R. Co. vs. Zachary,
232 U. S., 383.

A majority opinion of this Court speaking through Mr. Justice Van Davanter has held that an employee who is engaged in carrying bolts for the repair of a bridge used by an interstate commerce carrying railroad is engaged in interstate commerce.

Pedersen vs. Delaware L. & W. R. Co.,
229 U. S., 149.

This Court has also held, speaking through Mr. Justice Van Devanter, that a yard clerk employed by an interstate commerce carrying railroad in the State of Texas while engaged in the yards, in taking the number and initials on cars in an incoming freight train from Oklahoma was engaged or employed in interstate commerce.

St. L., S. F. and T. R. Co. vs. Seale,
229 U. S., 157.

Chicago Jct. Rw. vs. King,
169 Fed. Rep., 372.

Having determined by both the proof and the law that defendant in error's intestate at the time of receiving the injuries that produced his death was engaged or employed in an act of interstate commerce, and it having been admitted by plaintiff in error that it was engaged in the carriage of interstate commerce and that defendant in error's intestate was in its employ as a switchman in its yards at Fort Smith, we are then led to the discussion of whether or not the

coal car that brought about the injury was at the time engaged in interstate commerce. The proof on this point shows beyond controversy, indeed it is nowhere contradicted, that this car was loaded with coal at Huntington, on plaintiff in error's line of railroad in in the State of Arkansas, and was destined to some point in the State of Texas, and that it was forwarded from Fort Smith, Arkansas, to Paris, Texas, and was loaded with the same coal when it was so forwarded as when loaded at Huntington, Arkansas. This state of facts denominated this coal car as one engaged in interstate commerce, which character it kept, and which followed it until it arrived at its destination in the State of Texas. Its temporary stoppage in Fort Smith for repairs did not divest it of its interstate character. Nothing short of its arrival at its destination in Texas and there unloaded could do so.

In the case of *Chicago, M. & St. P. Ry. Co. v. Voelker,* the facts were these:

> "The car in question was loaded with coal, and was brought by defendant over its line of railroad from a station in the State of Illinois, and reached defendant's yards, at Dubuque, Iowa, about 5 o'clock in the afternoon. About 8 o'clock the next morning, when the injury to Voelker occurred, the car was on a freight track principally or largely used in receiving incoming freight trains and making up outgoing freight trains. A switching crew, in which Voelker was acting as car coupler and fieldman, was then engaged in

shifting about and coupling this coal car and several other loaded cars. While Voelker was between the coal car and another car separated by a distance of about 10 feet, and was engaged in adjusting the coupler on the coal car so that it would couple automatically upon impact, the two cars came together, catching him between the drawbars, and crushed him to death."

In passing upon the question as to whether the car with defective drawbar was then engaged in interstate commerce the U. S. C. C. of A. of the Eighth Circuit, speaking through Mr. Justice Van Devanter said, "We think there was evidence that the carriage or movement of the coal with which the car in question was loaded had not terminated and that the coal was still actually in transit. The evidence contains no suggestion that the car had reached the end of its journey, or that it was to remain indefinitely or for any considerable time on the track where it was at the time of the injury. * * * The shipment had originated in another state and was already impressed with the character of interstate traffic which would follow it at least until the actual transit has ceased."

65 C. C. A., 226,

S. C. 129 Fed., 522.

In the case of *Southern Railway v. The United States,* the facts were briefly these:

"The defendant, while operating a railroad which was, 'a part of a through highway' over which traffic was continually being moved from one state to another, hauled over a part of its railroad, during the month of February, 1907, five cars, the couplers upon which were defective and inoperative. Two of the cars were used at the time in moving interstate traffic, and the other three in moving intrastate traffic; but it does not appear that the use of the three was in connection with any car or cars used in interstate commerce."

In passing upon this state of facts the Supreme Court of the United States, speaking through Mr. Justice Van Devanter stated the principle that is not only applicable to the case at bar, but is indeed controlling, said:

"Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or

results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others."

222 U. S., 100.

The case of *Delk v. St. Louis & San Francisco Railroad Company,* decided on writ of error by this Court is on principle the case at bar. The facts in that case are these:

"The defendant company received lumber to be carried from Giles, Arkansas, to Memphis, Tennessee. In order that the consignee might receive the lumber the car containing it was delivered October 2nd, 1906, to the Union Railway Company, known as The Belt Line. But it was promptly returned the next day to the present defendant because of a defect in the coupling and uncoupling appliance on one end of it. The car in question was in a new yard of the defendant company and was in a string of 9 cars on what is known as the dead track in that yard. This track was called the team track because it was so arranged that teams might be loaded and unloaded from along side it. On the morning after the return of the car, October 14th, 1906, Delk, acting under the instructions of the agent of the defendant company undertook to switch certain cars out of the string of 9 cars so as to get two empty cars and three coal cars for removal to some other part of the company's line. * * * The cars were on the track extending in the gen-

eral direction of east and west, the engine being on the western end of the 9 cars. The 9 cars were drawn off of this team track on to the lead track. The eastermost cars being empty were left on the lead track. The remaining 7 cars were then pushed back on the team track. The eastermost 2 cars of the 7 cars loaded with brick were left on the team track. The remaining 5 cars were again drawn on to the lead track, and 3 cars loaded with coal were left thereon. * * * Defendant in error undertook to couple the eastern end of the two cars attached to the engine to the western end of the two cars just left on the team track, but owing to a defect in the coupler on the eastern end of the two cars attached to the engine, the coupling could not be made without a man going between the ends of the two cars. The defect in the car was this: The chain connecting the uncoupling lever to the lock pin or lock block was disconnected owing to a break in the lock pin or block. The drawbar also had a lateral motion of 4 inches. Defendant in error undertook to hold drawbar away with his foot from the side upon which he stood so that the two couplers would couple by impact. In so doing, his foot was badly injured."

Mr. Justice Harlan in delivering the opinion of this Court said quoting from the opinion of the Court of Appeals:

"The majority of the Circuit Court of Appeals (Judges Severens and Richards) held that the car with a defective coupling was at the time of the injury in question, and within the meaning of the act, engaged in interstate commerce. Judge Severens said:

" 'The plaintiff in error claims that it was not and was laid by for repairs. But we are inclined to think otherwise. Its cargo had not reached its destination, and was not then ready for delivery to the consignee, wherewith the commerce would have ended. Its stoppage in the yards was an incident to the transportation. * * * The car which caused the injury had a defective coupler. It would not couple automatically. As a result the plaintiff below under orders went between it and the car it was to be coupled to and tried to force the coupling by using his foot. In consequence his foot was caught in the impact of the cars and seriously injured. * * * After the coupler became defective and could not be coupled without going between the ends of the cars it became unlawful for the railroad company to haul it or permit it to be hauled, or used on its line. It then became the duty of the railroad company to withdraw the car from use and have it repaired to conform with the law before using it further. It did not do this, but continued to use the car in its defective condition. It could only do this under the penalty of the law. The car was defective, liable at any time to cause an accident, and it could not be kept in use at the constant risk of serious accident, either upon the excuse that it would be inconvenient to withdraw it from the service or that the company had sent for the required appliance, and would repair the car when it should be received. * * * This is a case peculiarly within the provisions of the act. A car loaded, and being used in moving interstate traffic was found with a defective coupler. The car was marked 'in bad order' and a repair piece sent for. After thus being notified of its condition the car should have been withdrawn, but it

was not, and the company kept on moving it about in connection with other cars."

We concur (said Justice Harlan) with the majority of the Court below that the car in question was being used in interstate traffic when the plaintiff was injured. * * * The construction of the statute adopted by a majority of the Circuit Court of Appeals, to the effect that the Act did not impose upon the carrier an absolute duty to provide and keep proper couplers at all times and under all circumstances, but was bound only to the extent of its best endeavor to meet the requirements of the statute has been rejected by this Court in *Chicago, B. & Q. R. Co. v. United States,* just decided, and on the authority of that case we hold the Circuit Court of Appeals erred in the particular mention."

220 U. S., 580.

In the case of *Erie Railway Company v. Russell, Admx.,* the facts were these:

"The defendant railroad company is engaged in interstate commerce and owns a railroad extending from Port Jervis, N. Y., to Newburgh, N. Y., and also running into other states. Port Jervis is 2 or 3 miles east of the state line between New York and Pennsylvania.

The defendant operates a local freight train between Newburgh and Port Jervis which, when running westerly, carries freight to stations on the road and picks up freight going to all points west, including points in other states. On the easterly trip western freight is picked up for

eastern points. On the afternoon of June 21, 1907, the car in question in this case was brought into Port Jervis in this train billed to the repair shop. It had a defective coupler; the knuckle being gone. It was empty and had been picked up at Greycourt, a station between Port Jervis and Newburgh. This train on said day carried freight going west of Port Jervis and to different states and one of the cars bore the initials of the Boston and Maine Railroad. There was another car in the train which was also in a crippled condition. The train, including the crippled cars, was left standing on a switch in the Port Jervis freight yard.

Russell, the plaintiff's intestate, was one of the night switching crew in the yard. On this afternoon this crew had begun work drilling out and switching the cars from the different trains which had come into the yard from the east and west. Before supper three cars had been placed on the No. 6 switch in the yard and left standing there. This switch had a slight grade. After supper the switching crew continued work and after some time ran the car in question attached to other cars upon said No. 6 switch. The intention of the switching crew was to repair the defective coupler and after repairing it to couple the train containing this car to the three cars aforesaid which had previously been left upon the switch. In backing up the train, this car came in contact with the other three cars, but was subsequently pulled away from them some 5 or 6 feet. The switching crew then started to look for a knuckle with which to repair the defective coupler. Knuckles were kept in various places in the yard and the switchmen were accustomed to replace

those found missing. Russell, the plaintiff's intestate, was the first to find one, and he went in between the cars and attempted to adjust it in the coupling apparatus, but the pin would not fit and one of the other men went to look for another pin. Russell was holding the knuckle in place with his back to said three standing cars, when, without any apparent cause, they moved silently down and caught and crushed him, inflicting the injuries from which he died. The car in question was taken the next day on the easterly trip of said local freight train and hauled to Goshen, N. Y."

In passing upon this state of facts the Court of Appeals, speaking through Mr. Justice Noyes, said:

"The car with the defective coupler was not withdrawn from use. Although billed to the repair shop, it was not sent there, nor was it sent to any place used especially for making repairs. * * * Upon this state of facts it is held that the Safety Appliance Act applies. * * * The fact that the accident occurred during the switching operations does not affect the application of the statute. * * * The character of its use was not changed during the switching operations at night. * * * We feel it our duty to follow the decision of the Circuit Court of Appeals for the Eighth Circuit in *Chicago, Etc. R. Co. v. Voelker*, 65 C. C. A., 226, in which it was held that the defective coupler was the proximate cause of the accident."

106 C. C. A. 160.

This case just quoted from is similar in fact to the case at bar, and was decided upon a state of facts

that occurred and existed nearly a year before the Act of April the 22nd, 1908, went into effect. If the interstate commerce carrying railway could be held liable, as was done in the case *supra,* under the then existing laws, then for a stronger reason plaintiff in error in the case at bar must be held liable and the judgment affirmed because of the Act of April 22nd, 1908, makes it absolutely liable. Or, in other words, the insurer of defendant in error's intestate. Indeed, if the Court pleases, the proof—the FACTS in the case at bar, we insist, brings it clearly within both the letter and spirit of the acts and statutes created for the protection of defendant in error's intestate in life and limb.

This Court speaking through Mr. Chief Justice Fuller has held that a dining car used and hauled by an interstate commerce carrying railroad while waiting for a train to be made up for its next trip was engaged in interstate commerce.

Johnson vs Southern Pac. R. Co.,
196 U. S., p. 1.

These facts and these authorities clearly impress the coal car in question as engaged in the carriage of interstate commerce at the time it brought about the death of defendant in error's intestate.

THE COAL CAR IN QUESTION DID NOT COMPLY WITH THE ACT OF CONGRESS OF

1893, AND ITS USE IN A DEFECTIVE CONDITION WAS UNLAWFUL AND AT PLAINTIFF IN ERROR'S SOLE RISK.

Congress in 1893, exercising the power vested in it by the Federal Constitution, brought into life a law commonly known as the Safety Appliance Act. The title of this act is "An Act to promote the **safety** of employes and travelers upon railroads by **compelling** common carriers engaged in interstate commerce to equip their cars with automatic couplers coupling by impact."

By Section 2 of this Act it is made unlawful for any such carrier to HAUL or PERMIT to be HAULED or USED on its line ANY car not so equipped. By Section 6 of this Act, it is provided, that any such carrier who HAULS or permits to be hauled or USED on its line shall be liable to a penal action, and the penalty is fixed at one hundred dollars for every such violation. It is not denied by plaintiff in error, by its answer or proof, that it was on the 13th day of November, 1910, engaged in interstate commerce. We do not, however, rely upon this admission alone, but also upon the proof introduced by defendant in error, all of which conclusively shows that plaintiff in error was moving its cars over its line of railroad loaded with merchandise from points in the State of Misouri into and through the States of Arkansas, Oklahoma, and Texas, and out of Texas into

and through the States of Oklahoma and Arkansas to St. Louis in the State of Missouri. This admission and proof denominates appellant an interstate common carrier of commerce and brings it within the provisions of this Act of Congress, and inhibits it from HAULING or USING ANY car not equipped with a drawbar that would couple by impact automatically with locomotives and other cars.

Now then was the car branded N. O. & N. E. and numbered 13239, which brought about and caused the death of defendant in error's intestate, so equipped? This question by force of the proof and the solemn admissions of appellant at trial in the Court below is answered in the negative. Again it may be asked, was the car in question being USED by plaintiff in error on its line of railroad at the time defendant in error's intestate was injured by it? We reply yes, because the proof shows that this car was found on a side track of plaintiff in error mixed and mingled indiscriminately with other cars, some loaded with commerce for states outside of the State of Arkansas. It will be borne in mind that the proof shows that this car was switched off the side-track with a cut of twelve or fourteen other cars, some loaded, as we have said, with commerce for other states, out onto plaintiff in error's main line track, over which it carries its interstate commerce, and hauled and used from there with this cut of cars over its main line track a distance of three-

quarters of a mile to a point four hundred yards beyond and away from the repair track and there on the main line track left standing in its defective and non-law-complying condition, until by reason of its defective and illegal condition it brought about and caused the injuries to defendant in error's intestate that ultimately caused and produced his death.

When plaintiff in error moved this defective car off its side-track and hauled it three-quarters of a mile over its main line track it was doing the very thing that Congress said it should not do without incurring the penalty denounced by it. While plaintiff in error concedes the defective condition of the car and concedes that it was moving it over its main line of railroad at the time complained of, yet it attempts to escape and evade its civil liability herein for the wrong done and produced by this defective car by contending that it was so hauling and moving the car to its repair track for the purpose of having it repaired. This contention of plaintiff in error is unsound. It cannot by it escape its civil liability to defendant in error because Congress in its wise determination to protect the life and limb of employes on railroads engaged in interstate commerce, by its Act of April 14th, 1910, has released such carrier from the PENALTY DENOUNCED by the Act of 1893, while hauling a car that has been properly equipped from the place where it may have become defective to the nearest point

where it can be repaired, but the Act in EXPRESS and SPECIFIC TERMS provides that such movement, using, and hauling of such car SHALL be at the SOLE RISK of the carrier, and that nothing in the Act shall be so construed as to relieve the carrier from liability in any REMEDIAL action for the death or injury of any employe caused by reason of, or in connection with the movement, hauling, or use of such car with equipment that is defective or insecure, or which is not maintained in accordance with the requirements of that and other Acts referred to.

We contend, if Your Honors, please, that every foot plaintiff in error moved the defective, non-law-complying car over its line of railroad for ANY purpose was, so far as to its CIVIL liability, solely and exclusively at its risk. Indeed, this contention of ours is the very language that was employed by the law-making power in Section 4 of the Act of April 14th, 1910. The zeal and determination of Congress to promote the safety of employees of interstate commerce carrying railroads is photographed and impressed upon the minds of every thinking, just and fair man by the title of the Act of April 14th, 1910, which reads:

"AN ACT TO PROMOTE THE SAFETY OF EMPLOYES * * * UPON RAILROADS BY COMPELLING COMMON CARRIERS ENGAGED IN INTERSTATE COMMERCE TO EQUIP THEIR CARS WITH AUTOMATIC COUPLERS."

That Congress was determined to accomplish its humane and laudable purpose of protecting such employes in their life and limb, and that its purpose and intent to secure this end should not be misunderstood or misconstrued and that all of its mandates and expressions on this subject theretofore passed should be observed, obeyed, and enforced, was not content to rely solely upon the title of Section 4 of the Act of April 14th, 1910, but by Section 5 of the Act it is expressly provided:

"THAT EXCEPT WITHIN THE LIMITS SPECIFIED IN THE PRECEDING SECTION OF THIS ACT THE MOVEMENT OF A CAR WITH A DEFECTIVE OR INSECURE EQUIPMENT MAY BE MADE WITHOUT INCURRING THE PENALTY PROVIDED BY STATUTES, BUT SHALL IN ALL OTHE RRESPECTS BE UNLAWFUL * * * ALL OF THE PROVISIONS, POWERS, DUTIES, REQUIREMENTS, AND LIABILITIES OF SAID ACT OF MARCH SECOND, EIGHTEEN HUNDRED AND NINETY-THREE SHALL APPLY TO THIS ACT."

A consideration of this Act above, drives one who has it under advisement for construction and application to the inevitable and certain conclusion that it was the clear intent of Congress—the law-making power—to make and hold every interstate commerce carrying railroad which violates, disregards, and defies its mandates and express provisions—which in-

deed and in fact HAULS or USES a car that does not comply with the requirements of the law, one that has no drawbar at all, or one that is defective, on its line of railroad, liable in all REMEDIAL OR CIVIL actions for the death of, or injury to one of its employes.

Much assistance in arriving at the intent of Congress when it passed the Act of April 14th, 1910, can be obtained from the remarks made by Senator Elkins, Chairman of the Interstate Commerce Committee, when this committee made its report upon the passage of this Act. The senator said:

> "The amendment proposed permitting movement without penalty of a defective car to a repair shop, when necessary, is deemed advisable, as the Supreme Court of the United States, in the Taylor case, held that the present act, which this act amends and supplements, is absolute, and there is therefore great doubt as to the right of a railroad company to move even a defective car to a point of repair without incurring the penalties of the act. It is with no intent of relieving the carriers from the construction put upon the act by the courts in personal injury to their employees is concerned, that this amendment is recommended. Such necessary movement is still to be at the risk of the carrier, and the absolute character of the act in its remedial features as determined in the Taylor case is intended to be preserved and maintained under this proposed amendment.
>
> "The carriers have urged this amendment to relieve them from penalties which they claim are possible under existing law, if a defective car is

hauled to a repair shop, although such movement is one which must necessarily be made for the purpose of placing such car in repair. * * *

"It is one of the perils of the operation of the railroad for which train men are not at all responsible. As it is practically obligatory upon the trainmen to incur such dangers, there should be no impairment of any rights of such trainmen by reason of the performance of such dangerous duty. As the law stands today prohibition of the movement of such defective car seems to be absolute, and the rights of the trainmen in operating such a car have been declared to be absolute. In removing the penalty for the hauling of such a defective car, when necessary, to a repair shop, it is intended by the terms of the proviso to preserve intact and unimpaired all the rights now existing by law to the train men, or his representative, to recover in case of injury or death resulting from the peril of participating in the movement of such defective car.

"It is but just that the risk of working about and the movement of defective equipment should be borne by the carriers. This amendment does not permit the movement of damaged cars in connection with those commercially used, and in every other respect the interests of the employees have been fully safeguarded.

"As there is danger in the movement of such defective cars, and as trainmen are obliged to handle them without any real option on their part so to do, it is but just and equitable that the risk attendant upon such movement, where death or injury to trainmen results, should be borne by the

carrier and not in any degree assumed by the trainmen. In removing the penalty for hauling of such a defective car, when necessary, to a repair shop, it is intended by the terms of the proviso to preserve intact and unimpaired all the rights now existing by law to the trainman or his representative, to recover in case of injury or death resulting from the peril of participating in the movement of defective equipment should be borne by the carriers."

U. S. Senate Report No. 250.
61st Congress, 2nd session, p. 3.

If it can possibly be said that we are wrong in our contention under the Acts of Congress of 1893 and 1910, under which we so far have urged plaintiff in error's liability in case at bar, then we revert to the Act of Congress commonly known as the Employers' Liability Act, passed April 22nd, 1908, and insist that under Section One of that Act, plaintiff in error being an interstate commerce carrying railroad, cannot escape liability to defendant in error in this action because it is provided by this section of the act THAT EVERY COMMON CARRIER BY RAILROAD WHILE ENGAGED IN COMMERCE BETWEEN ANY OF THE SEVERAL STATES SHALL BE LIABLE IN DAMAGES TO ANY PERSON SUFFERING INJURY WHILE HE IS EMPLOYED BY SUCH CARRIER IN SUCH COMMERCE, or in case of his death to his personal representative for the benefit of the surviving widow and children of such

employee for such injury or death resulting in WHOLE or in PART from the negligence of any of the officers, ag nts, or employees of such carrier, or by reason of any DEFECT or INSUFFICIENCY due to its negligence in its cars, track, or appliances.

This Court speaking through Mr. Justice Moody in construing the safety appliance act of Congress has said:

> "The Congress not satisfied with the common law duty and its resulting liability has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted 'No cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of the words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does in point of fact use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. * * * Where an injury happens through the absence of a safe drawbar there must be hardship. Such an injury must be irreparable misfortune to some one. If it must be borne entirely by him who suffers it that is a hardship to him. If its burden is transferred, so far as it is capable

of transfer, to the employer it is a hardship to him. It is quite conceivable that Congress contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burden upon those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, to seek some unnatural interpretation of common words."

St. L., I. M. & So. Rw. vs. Taylor,
210 U. S., 281.

The case at bar being, as we have heretofore said, in principle the Delk case, *supra,* the proof showing conclusively that the coal car branded N. O. & N. E. and numbered 13239 was in a defective and unlawful condition, and that plaintiff in error had knowledge of such defective and unlawful condition, and after having such knowledge used same in interstate commerce, it did so at its sole risk and peril, and, under the acts *supra* it is liable in damages for all injuries that it directly caused or contributed to cause to defendant in error's intestate, from which there is no legal escape.

DEFENDANT IN ERROR'S INTESTATE NOT GUILTY OF CONTRIBUTORY NEGLIGENCE AND COULD NOT BE HELD TO HAVE ASSUMED ANY RISK OF HIS EMPLOYMENT GROWING OUT OF PLAINTIFF IN ERROR'S NEGLIGENCE IN EQUIPPING ITS CARS.

Plaintiff in error's learned counsel by the IV assignment in error urges that intestate assumed the risk that brought about his injuries, and was himself guilty of contributory negligence that caused his injuries and death. To this contention we have only to call the Court's attention to the Act of Congress of April 22nd, 1908, 35 Stat. L., 65-66, which absolves the employee from the assumption of the risk from any injury that was occasioned or contributed to by the use of any car not equipped with an automatic coupler as is by law required, and absolutely and entirely absolved him from contributory negligence when such employee was injured in any case where the violation by the common carrier of any statute enacted for his safety contributed to the injury or death of the employee. It is needless to say or urge here that the Act of Congress of 1893, known as the Safety Appliance Act was enacted for the safety of em-

ployees engaged in an act of interstate commerce by a carrier of interstate commerce.

St. L., I. M. & So. Rw. vs Taylor,
210 U. S., 281.

Johnson vs. Southern Pac. R. Co.,
196 U. S., 1.

CAUSE OF ACTION FOR LOSS OF SERVICE AND PAIN AND SUFFERING OF INTESTATE SURVIVED TO HIS PERSONAL REPRESENTATIVE.

By the Act of Congress of April 22nd, 1908, known as the Employers' Liability Act, Ch. 149, 35 Stat. L., 65-66, a cause of action was created and given to an employee of an interstate commerce carrying railroad for any injuries he might receive through the negligence of such railroad while engaged or employed in interstate commerce, and in case of the death of such employee then the right of action accrued to the employee's personal representative for the use and benefit of the widow and children, if any, of such employee. This act was construed by the courts as giving compensation only for the loss of services of the deceased employee to his widow and children, and that the cause of action for pain and suffering endured by such employee from such in-

juries did not survive to the personal representative of such employee. After this act was so construed Congress, exercising its constitutional powers, on the 5th of April, 1910, amended the Act of 1908 so as to survive the cause of action for pain and suffering endured by the injured employee from the injuries he so received, to his personal representative. It would be, we submit, doing great violence to the expressed will and intent of the law-making power to hold that since it gave a right of action to the personal representative of the deceased employee for the use and benefit of his widow and children for the loss of his services, and, by amendment, survived to the employee's personal representative the action for the pain he endured and suffered from the injuries he so received, to hold that Congress intended that if the personal representative of the deceased employee recovered for the loss of services of such employee that no recovery could be had for the pain such employee suffered from his injuries, or that if such representative recovered for the pain suffered by such employee from such injuries then no recovery could be had for the loss of his services. It is clear in the light of the decisions of the courts before the amendment of April 5th, 1910, that Congress by the use of the words "but in such cases there shall be only one recovery for the same injury" intended to limit the loss of the services of the deceased employee and the pain and suffering he en-

dured for the use and benefit of the widow and children of such employee; that if a recovery was had for their use and benefit for the loss of such employee's services and for the pain and suffering which he endured from his injuries then no similar recovery could be had for the use and benefit of the parent or next of kin dependent upon such employee, or, in other words, if the representatives recovered for the use and benefit of the widow and children then no action could be sustained for the use and benefit of those subsequently named in the act. In our judgment this is precisely what Congress intended when it brought into life the law of April 5th, 1910.

This Court speaking through Mr. Justice Lurton, in commenting upon the Act of April 5th, 1910, amending the Act of 1908 by adding Section 9 to said Act, has said:

> "We think the act declares two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles. It plainly declares the liability of the carrier to its injured servant. If he had survived he might have recovered such damages as would have compensated him for his expense, loss of time, suffering and diminished earning power. But if he does not live to recover upon his own cause of action, what then? Does any right of action survive his death and pass to his representative?

This is a question which depends upon the statute."

Michigan C. R. Co. vs. Vreeland,
227 U. S., p. 59.

The Supreme Court of Arkansas in passing upon the question of the right of deceased's personal representative to recover not alone for the loss by the widow and children of intestate of the services of intestate but for his pain and suffering endured from his injuries, and construing Act of April 5th, 1910, speaking through Mr. Chief Justice McCulloch, said:

> "The statute as thus amended forbids the prosecution of more than one action and permits only one recovery; but the action is prosecuted after the death of the injured person, for the benefit of the widow and next of kin, and may include compensation for the pain and suffering endured by the injured person as well as for pecuniary loss of earnings and contributions; in other words, injury for which the statute provides a remedy inures after the death of the injured person to the benefit of the widow and next of kin, but must be recovered in one action. In the present case no action had been instituted by the injured employee, and plaintiffs prosecuted only one cause of action and seeks only one recovery for the various elements of damages for which the statute authorizes a recovery of compensation. There was, therefore, nothing to call for an election between different causes of action."

St. L. & S. F. Rd. Co. vs. Conarty,
106 Ark., 421.

While this authority is not binding here, yet its logic and reason is so sound and so reflective of the intent and purpose of Congress when it passed the Amendment of 1910, it will, we are sure, have great weight and force with this Court in arriving at a correct construction of said amendment, if, indeed, the Vreeland case, *supra*, does not sustain our contention.

We, upon these authorities, and upon reason, submit that the trial Court committed no error in overruling plaintiff in error's motion to compel defendant in error to elect whether she would prosecute alone for loss of intestate's services, or for the pain and suffering he endured. To have sustained the motion would have been error, and brought about a condition that Congress never intended.

THE DEFECTIVE CONDITION OF THE COAL CAR WAS THE PROXIMATE, IF NOT THE PRIMAL CAUSE OF THE INJURY AND DEATH OF INTESTATE.

It is perfectly clear that if the car in question had been equipped as the law directs, the death of appellee's intestate would not have occurred. The proof conclusively shows that there was no drawbar in the end of the car with which the locomotive upon which deceased was riding collided.

Section 1 of the Act of 1893 expressly provides that if the death of such employee results in whole or in part by reason of any defect or insufficiency of the cars, that the carrier shall be liable.

Aside from this, the deceased was injured by the unlawful conduct of plaintiff in error, or by the use of a car upon its main line track that was not equipped with a drawbar as is required by law.

The proof shows that if the car had been equipped with an automatic coupler as the law directs, that when the locomotive struck it the effect of the striking would have been to have pushed the car away from the locomotive, or if the drawbar had been present when the locomotive struck the car there would have been ample room on the foot-board of the locomotive for the deceased to have stood in perfect safety. The fact that the car was without a coupler that would couple automatically by impact, and that, when the locomotice collided with it by reason of the want of such coupler it caught the deceased and crushed him to death, conclusively shows that the violation of the law upon the part of appellant in using a car without such coupler was the proximate and only cause of the injury and death of the intestate.

At least, we submit that the want of such coupler in the car resulted, in part, if not solely, to the injury and death of the intestate. This is sufficient under Section 1 of the Act of April 22nd, 1908, *supra.*

THE EVIDENCE OF DEFENDANT IN ERROR WAS COMPETENT AND PROPERLY ADMITTED.

We know of no act of Congress that would preclude the widow as administratrix of the estate of intestate from testifying about the earnings and contributions of intestate to herself and children, or of his love, care of, and interest in the moral and mental education and training of his children.

The Supreme Court of Arkansas has held such evidence to be competent and admissible.

St. L. & S. F. Rd Co. vs. Fithian,
106 Ark., 491;

St. L. & S. F. Rd. Co. vs. Conarty,
s. c of one at bar, 106 Ark., 421;

Giles, Admr. vs. Wright,
26 Ark., 476;

United States vs. Clark,
96 U. S., p. 37.

1st *Greenleaf on Evidence,*
Sec. 348-350.

THE EVIDENCE OF F. T. WOOLUM AND W. J. DANIELS WAS COMPETENT AND PROPERLY ADMITTED.

Section 1 of the Act of Congress of 1908, provides that if the injury or death of the employee was the result in whole or in part from the negligence of the carrier the carrier would be liable. It therefore became and was a question for the jury to determine whether the condition of the coal car solely or in part caused the injury. Therefore, any evidence that would enable them to properly determine this question was material and competent. Both Mr. Woolum and Mr. Daniels testified that they had had many years' experience in switching and handling cars equipped with automatic couplers and knew the effects they would have in coming together, and that if the cars were properly equipped with couplers there would be ample room between them and the foot-board on the engine for a man to remain and stand in safety. That in the absence of a coupler there would not be. This evidence was material and competent to show that the absence of the coupler on the coal car at least contributed to the injury of intestate. That this evidence was competent we cite the following authorities:

1st *Greenleaf, Evidence,* 14th Ed., Sec. 440.

Eastern Transportation Line vs. Hope,
95 U. S., 297;

Western Coal & Min. Co. vs. Berberich,
36 C. C. A., 368;

The City of Washington vs. Baillie,
92 U. S., 331;

Union Ins. Co. vs. Smith,
124 U. S., 405;

Tex. & Pac. R. Co. vs. Watson,
190 U. S., 23.

RULES OF PLAINTIFF IN ERROR.

Plaintiff in error urges in its IV assignment of error that its rule 93 was known to intestate and for that reason under this rule he was guilty of negligence that contributed to his injury and death. To this contention we have only to reply that Congress by the Act of April 22nd, 1908, expressly provides "That any contract, rule, regulation, or devise whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act shall to that extent be void."

There is nothing in this rule, however, that would justify the use, hauling, or movement of crippled, bad order, or unlawfully equipped cars on the main line track, and nothing in the proof shows that intestate was expected to find any such cars on the main line

track, and nothing in the proof or rule that shows or tends to show that intestate was not upon the main line track with the engine under proper conditions.

THE TRIAL COURT HAD JURISDICTION OF THE CAUSE AND NO ERROR WAS COMMITTED IN REFUSING TO TRANSFER THE CAUSE TO THE FEDERAL COURT.

We do not believe that the able counsel of plaintiff in error are sincere or in earnest in their contention that the trial court had no jurisdiction or that it erred in refusing to remove the cause to the Federal Court, because by the Act of Congress of March 3rd, 1911, it is expressly provided that actions brought in a state court of competent jurisdiction against common carriers under the Act of Congress of 1908 shall not be removed to any court of the United States.

36 Stat. L., 1094.

This question has been settled by this Court. For that reason it is needless for us to comment further upon it.

Mondou vs. N. Y., N. H. & H. Rw. Co.,
223 U. S., 1.

There were no objections made or exceptions saved in the trial Court as to the form of the verdict. The motion to elect was not sufficient to raise that

question, or to request the trial Court to direct the jury as to the form of their verdict. No error is assigned here and none was preserved in the motion for new trial in the trial Court as to the form of the verdict. It is now too late to raise the question for the first time here.

Southern Rw. Co. vs. Smith,
205 Fed., 360;
S. C. 123 C. C. A., 488.

Yazoo & M. V. R. Co. vs. Wright,
207 Fed., 281.
s. c. 125 C. C. A. 25.

THE INSTRUCTIONS GIVEN BY TRIAL COURT.

The instructions [redacted] were much more liberal to plaintiff in error than it could have demanded under the law and authorities *supra*. They submitted to the jury for their guidance the question of proximate cause of the injury and expressly directed them that if the want of proper equipment of the car was not the cause of injury and death of the intestate, or that if it was the cause and yet not the proximate cause of intestate's injury and death, plaintiff in error was not liable.

The instructions also directed the jury to find for

plaintiff in error if they found that intestate was negligent for his own safety in remaining upon the footboard after discovering the coal car upon the track. They also directed the jury that if intestate discovered the car on the track without coupling appliances and did not use ordinary and reasonable care for his own safety to avoid the injury, then such want of care was the primary cause of injury and defendant in error could not recover.

The instruction upon the amount of recovery is in harmony with the rule announced by this Court where it is said, "The rule is not so narrow as to exclude the loss of services of the husband, wife or child, and when the beneficiary is a child for the loss of that care, counsel, training, and education which the child might under the evidence have reasonably received from the parent." These instructions are based upon the law controlling this cause, and the verdict is responsive to them and is supported by ample legal evidence.

Mich. C. R. Co. vs. Vreeland,
227 U. S., 59.

CONCLUSION.

In conclusion we respectfully submit that the writ of error from the Supreme Court of Arkansas was improperly granted because no Federal question was raised in this cause for adjudication that had not been by this Court adjudicated and settled against plaintiff in error's contention before and prior to the 23rd day of April, 1913, the day on which the writ was granted or allowed.

Mich. C. R. Co. vs. Vreeland,
227 U. S., 59;

Delk vs. St. L. & S. F. R. Co.,
220 U. S., 580;

Johnson vs. So. Pac. R. Co.,
196 U. S., 1;

St. L., I. M. & So. R. Co. vs. Taylor,
210 U. S., 281.

Upon these authorities and the whole record we most respectfully submit and insist that there is no error disclosed that was prejudicial to plaintiff in error; that it is apparent that the writ of error was sued out and this appeal prosecuted for the sole purpose of delaying proceedings on the judgment in the Court below. For that reason we insist that the judgment should in all things be affirmed with the penalty provided by Section 2 of Rule 23 of this Court.

Respectfully submitted,

SAMUEL R. CHEW,

Attorney for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Plaintiff in Error,
vs.
FANNIE M. CONARTY, as Administratrix of the Estate of W. G. Conarty, Deceased,
Defendant in Error.
No. 166

DEFENDANT'S REPLY BRIEF

Since writing and filing our brief in chief in this cause we have received from plaintiff in error its two supplemental briefs in which it expressly abandons all assigned errors except those numbered III, VII, and VIII. These are respectively, proximate cause, error in overruling motion to compel defendant to elect, and refusal of the trial Court to direct a verdict for plaintiff in error.

We have discussed these questions in our brief in chief, and for this reason would not impose ourselves further upon the Court were it not for the mistaken, erroneous, and untenable position of counsel for plaintiff in error, and counsel as *amicus curiae,* as to the construction that should be placed upon Section 9 of the Act of Congress of April 5th, 1910. We, therefore, ask the Court's consideration of this addition to our former brief. We shall here attempt to answer the argument of counsel upon these three assignments of error, and will discuss them in their respective order.

PROXIMATE CAUSE.

Let it be remembered all the while that plaintiff in error in its supplemental brief expressly abandons each and all of its assigned errors except the three named above. In so doing it concedes that the car in question was engaged in interstate commerce at the time intestate was injured by it; that said car was not equipped with a draw-head that would couple automatically by impact onto another car as is by the Acts of Congres required; that intestate was at the time he was so injured engaged in an act of interstate commerce and at his post of duty; that said car at

the time of said injury was itself employed or engaged in the movement of interstate commerce. With these concessions we have only to determine that intestate was injured by said car and that said injuries resulted from a defective non-law-complying condition of said car to make plaintiff in error liable under Section 1 of the Act of Congress of April 22nd, 1908, by which it is provided that every comon carrier by railroad while engaged in interstate commerce shall be *liable in damages* to its employees suffering injury while engaged or employed in interstate commerce and where such injuries resulted *in whole or in part* by reason of any negligent defect or insufficiency in its cars, engines, etc., and that in the event of the death of such employee resulting from such negligence then a cause of action survives to his personal representative for the use and benefit of the persons mentioned in said act in their respective order or class to the exclusion of the subsequent mentioned ones.

Sec. 1, 25 Stat. L., 65.

The record is pregnant with proof that establishes beyond cavil the fact that the absence or want of a draw-bar in the car in question such as is provided by law, one that would couple automatically by impact, was the sole, exclusive, and only cause of intestate's injury and death.

Proximate cause is, as we understand it, one which operating in its usual, ordinary, and reasonably to be expected course would likely produce and bring about the injury complained of. We submit and insist that all reasonable and ordinarily prudent men would have anticipated and expected to occur and happen just what did occur and happen when the defective car in question was put in use and left standing upon a track in common use with interstate traffic. Especially is this true when by law the use in any manner of a car in such defective condition as was the one in the case at bar is expressly inhibited.

We again insist that the record fails to disclose any proof of a new, independent, intervening, and efficient act of negligence sufficient within itself to stand as the immediate or proximate cause of the injury and death of intestate, or, indeed that caused, or contributed to cause the locomotive or engine upon which intestate was at the time he was so injured to collide with the defective car in question, but upon the contrary the proof shows without cavil that the locomotive or engine was at the time being properly and carefully handled and that intestate was at his post of duty upon the foot-board of the locomotive or engine at the time he so received said injuries by reason of the defective car in question. These facts inevitably drive us to the conclusion that the defective condition of the car in question was the only and sole cause of intestate's injury and resulting death.

Ins. Co. vs. Tweede,
7th Wall., 44;

R. R. Co. vs. Kellogg,
94th U. S., 469;

MacDonald vs. Snelling,
14th Allen, 294;

Scheffer vs. Washington City, etc. R. R. Co.,
105 U. S., 249;

Johnson vs. So. Pac. R. Co.,
196 U. S., 1.

It is needless for us to discuss this question of proximate cause any further because the statutes *supra* expressly make plaintiff liable in damages where the injury complained of was in *whole* or in *part* due to the defective condition of the car in question. We insist that it cannot be successfully contended that the proximate cause of intestate's injuries and death was the fact that he remained upon the foot-board of the engine because the proof shows that there was his post of duty, and because the proof shows beyond cavil that if the car had been equipped with a draw-bar such as the law prescribes the injury and death of intestate would not have occurred.

Witness Armstrong testified that if the car in

question had been equipped with a draw-bar the engine would have coupled onto it automatically and intestate would have had a safe place on which to stand and perform his duty.

P. R. pp. 20-21.

To the same effect is the evidence of Witness Woolum, who in addition testified that if the car had been properly equipped with a coupler and the engine struck it and the knuckle of the coupler was closed that the striking of the car by the engine would have pushed the car out of the way, or if the knuckle had been open the car would have coupled by impact with the engine and intestate would have been safe.

P. R. pp. 44-45.

See also the evidence of witness Daniels.

P. R. pp. 37-38.

Again we insist that predicated upon this state of facts and the law as it is written plaintiff's unlawful use of the car in question was the primal, proximate, and only cause of the injury and death of intestate.

CONSTRUCTION OF SECTION 9 OF THE ACT OF APRIL 5th, 1910.

Section 9 of the Act of Congress of April 5th, 1910, is not susceptible of the narrow and strained construction that plaintiff insists should be given it. In construing and applying this section Congress will be indulged in the presumption of knowing the construction placed upon the Act of April 22nd, 1908, by the Courts, and in order to correct this construction it amended the Act of 1908 by adding thereto Section 9 of April 5th, 1910, so that the personal representative of the deceased injured employee whose injuries and death were the result in whole or in part of the negligence of the carrier could recover for the use and benefit of those named in the Act in their respective order for both the loss of the services or contributions to them by the deceased employee and for his pain, mental and physical suffered by him from the infliction of the injury up to the time of his death.

Under the Acts above referred to if the injured employee survived his injuries then his ground for recovery would have been his loss of time, his decreased or diminished capacity to work and earn money, his disfigurement or mutilation, the expense he incurred in attempting to heal and cure his in-

juries, the mental and physical pain he suffered as a result of his negligent injuries. If death, as in the case at bar, of the injured employee resulted from said injuries before he recovered for same then under Section 1 of the Act of 1908 there is given a right of action to his personal representative for the loss sustained by those mentioned in the Act in their order, first to the surviving widow or husband, and children; if none of these existed, then second, to his parents; if these did not exist then third, to the next of kin of the employee who were dependent upon him. Certainly Congress in creating Section 9 of the Act of April 5th, 1910, which is amendatory to the Act of April 22nd, 1908, did not intend to do so vain and foolish a thing as to say to the personal representative of the deceased employee: Your intestate survived his injuries and suffered mental and physical pain for an appreciable length of time and it is true that your intestate left surviving him a widow and children or parents, as the case might be, yet you are remitted to recover for their use and benefit the loss of his contribution to them, or only for the pain and suffering he endured from the happening of the injury to his death. This is the construction that plaintiff is asking should be given this amendatory Act of April 5th, 1910, which in our judgment is too strained and too narrow to withstand the searchlight of good common sense and judicial application because it would put the alternative to the personal representa-

tive to sue for mental and physical suffering only and alone, or for loss of services and contribution only and alone, which alternative he could not intelligently determine in *limine.*

By the use of the words in the latter part of Section 9 of the Act of April 5th, 1910, *"but in such case there shall be but one recovery for the same injury."* Congress never intended to create a recovery for alternative causes for damages, but manifestly intended that there be *one* recovery *only* for *all* elements of damage which include pain and suffering prior to death and loss of contribution to dependents after death. The natural, reasonable and logical conclusion is that Congress intended when it added to the Act of April 22nd, 1908, by amendment Section 9 of April 5th, 1910, to allow the personal representative of the deceased employee to recover in *one* action the losses sustained by the surviving widow and children of the deceased employee of his contributions and for the pain and suffering the employee endured by reason of his injuries. Any other construction of these Acts would lead to a chaotic, unsettled and confused condition, in, that the personal representative could not in *limine* determine intelligently which element of damages he should seek to recover upon. Of course, if the death of the employee was *instantaneous* and no mental and physical pain could be shown, then the only basis of recovery would be the loss of the employee's services. That

these acts should be construed as we contend for is strongly intimated by this Court speaking through Mr. Justice McReynolds in the case of *Norfolk & Western Railway vs. Holbrook,* decided January 5th, 1915, where the Court says: "Under the Employer's Liability Act where death is *instantaneous* (italics ours) the beneficiaries can recover their pecuniary loss and nothing more."

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN REFUSING TO DIRECT A VERDICT FOR PLAINTIFF.

By sections 3 and 4 of the Acts of Congress of April 22nd, 1908, intestate was absolved from the common law rule of contributory negligence and assumed risk because the proof shows that his injuries were produced and brought about by plaintiff's violation of Sections 2 and 8 of the Act of Congress of March 2nd, 1893. These latter sections were manifestly, indeed expressly, enacted for the safety of intestate and all persons who engage in similar employment.

35th Stat. L., 66.

25th Stat. L., 531-532.

In conclusion we again insist that in the case at bar there has been but one recovery, and this recovery

bars any further recovery for the same injury. We, therefore, insist that the record fails to disclose any error committed upon the trial of this cause to the prejudice of plaintiff's rights, and that the judgment should be in all things affirmed. It is apparent that there is no substantial Federal question raised on this appeal for adjudication and that the appeal or writ of error was sued out solely for the purpose of delay, for which reason the penalty as prescribed by Section 2 of Rule 23 of this Court should be awarded upon the amount of the judgment.

Respectfully submitted,

SAMUEL R. CHEW,

Attorney for Defendant in Error.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v. CONARTY, ADMINISTRATRIX.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 166. Submitted March 3, 1915.—Decided June 14, 1915.

Where a duty is imposed for the protection of persons in particular situations or relations, a breach of it which happens to result in injury to one in an altogether different situation or relation, is not, as to him, actionable.

The evils against which the coupler provisions of the Safety Appliance Act are directed are those which attended the old fashioned link and pin couplings where it was necessary for men to go between the ends of the cars to couple and uncouple them: it was not enacted to provide a place of safety between colliding cars.

An employé of a railroad company not endeavoring or intending to couple or uncouple a car or to handle it in any way but riding on an engine that collided with it, is not in a position where the absence of a coupler and drawbar prescribed by the Safety Appliance Act operates as a breach of duty imposed by that Act for his benefit.

106 Arkansas, 421, reversed.

THE facts, which involve the construction and application of the Safety Appliance Act in an action for injuries based upon the Employers' Liability Act, are stated in the opinion.

Mr. W. F. Evans and *Mr. Thomas P. Littlepage*, with whom *Mr. B. R. Davidson* was on the brief, for plaintiff in error:

The cause should have been removed to the Federal court. *Gains* v. *Fuentes*, 92 U. S. 10, 17; *Gavin* v. *Vance*, 33 Fed. Rep. 84, 85; *In re Woodbury*, 98 Fed. Rep. 833, 837; *Harrison* v. *St. L. & S. F. R. R.*, 232 U. S. 318; *Martin* v. *Hunter*, 1 Wheat. 304, 327; *Reagan* v. *Farmers L. & T. Co.*, 154 U. S. 362, 391; *Robertson* v. *Baldwin*, 165 U. S.

275, 279; *Sharon* v. *Terry*, 33 Fed. Rep. 337, 355; *State* v. *Coosaw Mining Co.*, 45 Fed. Rep. 804, 810; *Van Brimmer* v. *Tex. & Pac. Ry.*, 190 Fed. Rep. 394, 399.

The coal car had been withdrawn from commerce. *C. & N. W. R. R.* v. *United States*, 168 Fed. Rep. 236; *Delk* v. *St. L., I. M. & S. Ry.*, 220 U. S. 580, 585; *Erie R. R.* v. *United States*, 197 Fed. Rep. 287; *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473; *Nor. Car. R. R.* v. *Zachary*, 232 U. S. 248; *Siegel* v. *N. Y. C. & H. R. R.*, 178 Fed. Rep. 873; *Southern Ry.* v. *Snyder*, 187 Fed. Rep. 492, 497; *Taylor* v. *Bos. & Me. R. R.*, 188 Massachusetts, 390; *United States* v. *Erie Ry.*, 212 Fed. Rep. 853, 855; *United States* v. *Louis. & Nash. R. R.*, 156 Fed. Rep. 195; *United States* v. *Rio Grande & W. Ry.*, 174 Fed. Rep. 399.

The absence of the coupler was not the proximate cause of injury. *A., T. & S. F. Ry.* v. *Calhoun*, 213 U. S. 1; Beach on Con. Neg. (2d ed.), § 31; Broom's Legal Maxims, § 215; *C., B. & Q. Ry.* v. *Richardson*, 202 Fed. Rep. 836; Cooley on Torts, pp. 68–71; *Cole* v. *G. S. & L. Soc.*, 124 Fed. Rep. 113; 3 Elliott on Railroads (Original ed.), § 1310; *Gill* v. *Railway Co.*, 160 Fed. Rep. 260; *Gilbert* v. *Railway Co.*, 128 Fed. Rep. 529; *Henry* v. *St. L., K. C. & N. Ry.*, 76 Missouri, 288, 293–4; *Logan* v. *Railway Co.*, 129 S. W. Rep. 575; *Lyddy* v. *Louis. & Nash. R. R.*, 197 Fed. Rep. 524; *Midland Valley Ry.* v. *Fulgham*, 181 Fed. Rep. 91; *Pennell* v. *Penna. R. R.*, 231 U. S. 675, 679; Ray's Negligence of Imposed Duties (Personal), 133; Shearman & Redfield on Negligence (5th ed.), §§ 25 and fol.; *St. L., I. M. & S. Ry.* v. *McWhirter*, 229 U. S. 265, 280, 282; 1 Thompson's Comm. on Neg. (2d ed.), § 45; Webb's Pollock on Torts (Enlarged Am. ed.), 29; Watson on Damages for Pers. Inj., §§ 33–35; 1 White on Pers. Inj., §§ 20–39.

Deceased's negligence was cause of his death—assumption of risk. *Butler* v. *Frazee*, 211 U. S. 459, 465; *Gibson* v. *Ches. & Ohio R. R.*, 215 Fed. Rep. 27; *Ches. & Ohio R. R.*

v. *Hennessey*, 96 Fed. Rep. 713; *C., R. I. & P. Ry.* v. *Shipp*, 174 Fed. Rep. 353; *C., R. I. & P. Ry.* v. *Jackson*, 178 Fed. Rep. 832; *Erie Ry.* v. *Kane*, 118 Fed. Rep. 223; *Int. & Gr. N. Ry.* v. *Story*, 62 S. W. Rep. 130; *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473; *Ill. Cent. R. R.* v. *Hart*, 176 Fed. Rep. 245–247; *Jackson* v. *Mo. Pac. Ry.*, 104 Missouri, 448; *Riley* v. *Louis. & Nash. R. R.*, 133 Fed. Rep. 904; *Schweig* v. *C., M. & St. P. Ry.*, 216 Fed. Rep. 750; *Seaboard Air Line* v. *Horton*, 233 U. S. 492; *Southern Ru.* v. *Crockett*, 234 U. S. 725; *St. L. & S. F. R. R.* v. *Dewees*, 153 Fed. Rep. 56; *Suttle* v. *C. O. & G. Ry.*, 144 Fed. Rep. 668; *Tex. & Pac. Ry.* v. *Bousman*, 212 U. S. 536, 541.

The members of both crews were fellow servants. *Allen* v. *N. Y., N. H. & H. R. R.*, 174 Fed. Rep. 779; *Beutler* v. *Grand Trunk Ry.*, 224 U. S. 85; *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473.

With a safe and dangerous course open to him, deceased selected the dangerous one. *Hirsch* v. *F. B. Bread Co.*, 150 Mo. App. 162, 174; *Moore* v. *Railway Co.*, 146 Missouri, 572, 582; *Smith* v. *F. N. Box Co.*, 193 Missouri, 716.

Plaintiff, as the wife of deceased, was an incompetent witness. *Cash* v. *Kirkham*, 67 Arkansas, 318; *De Beaumont* v. *Webster*, 71 Fed. Rep. 226; *De Roux* v. *Girard*, 112 Fed. Rep. 89; *Jarvis* v. *Andrews*, 80 Arkansas, 277; *Luken* v. *L. & M. S. Ry.*, 248 Illinois, 377; *Morris* v. *Norton*, 75 Fed. Rep. 912; *Mut. Life Ins. Co.* v. *Watson*, 30 Fed. Rep. 653; *Nunely* v. *Becker*, 52 Arkansas, 520; *Page* v. *Burnstine*, 102 U. S. 664; *Park* v. *Lock*, 48 Arkansas, 133; *Rainwater* v. *Harris*, 51 Arkansas, 401; *Rush* v. *Prescott & N. W. Ry.*, 83 Arkansas, 210; *Williams* v. *Waldon*, 82 Arkansas, 138; *Wilson* v. *Edwards*, 79 Arkansas, 69; *Whitney* v. *Fox*, 166 U. S. 664.

The testimony of witnesses Daniel and Woolum was also incompetent. *Gutridge* v. *Mo. Pac. Ry.*, 94 Missouri, 468, 472–3.

Defendant's motion to require plaintiff to elect on which cause of action she would prosecute should have been sustained. Thornton, Fed. Empl. Acts (2d ed.), § 104; *Andrews* v. *Hartford &c. Ry.*, 34 Connecticut, 57; *American R. R.* v. *Berch*, 224 U. S. 547; *Casey* v. *Transit Co.*, 205 Missouri, 721; Cooley on Torts (2d ed.), 309; *Daubert* v. *Western Meat Co.*, 139 California, 480; *Edwards* v. *Gimbel*, 202 Pa. St. 30; 3 Elliott on Railroads, § 1375; *Fulgham* v. *Midland Valley Ry.*, 167 Fed. Rep. 660; *Fithian* v. *Railway Co.*, 188 Fed. Rep. 842; *Gulf, C. & S. Ry.* v. *McGinnis*, 228 U. S. 173; *Garrett* v. *Railway Co.*, 197 Fed. Rep. 715; *Hendrix* v. *Am. Exp. Co.*, 138 Kentucky, 704, 709; *Hartigan* v. *So. Pac. Ry.*, 86 California, 142; *Littlewood* v. *Mayor of New York*, 89 N. Y. 24; *Legg* v. *Britton*, 64 Vermont, 652; *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59; *Munro* v. *Dredging Co.*, 84 California, 515; *McCafferty* v. *Penna. Ry.*, 193 Pa. St. 339; *St. L., I. M. & So. Ry.* v. *Hesterley*, 228 U. S. 702; *Strode* v. *St. L. Transit Co.*, 197 Missouri, 616; Shearman & Redfield on Neg. (5th ed.), § 140; *Walsh* v. *Railway Co.*, 173 Fed. Rep. 494.

Mr. Samuel R. Chew for defendant in error:

Intestate was engaged in an act of interstate commerce. *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 383; *Pedersen* v. *Del., Lack. & W. R. R.*, 229 U. S. 149; *St. L., S. F. & T. Ry.* v. *Seale*, 229 U. S. 157; *Chicago Jct. Ry.* v. *King*, 169 Fed. Rep. 372.

The defective coal car was engaged at the time of the injury in interstate commerce. *Chicago, M. & St. P. Ry.* v. *Voelker*, 129 Fed. Rep. 522; *Southern Ry.* v. *United States*, 222 U. S. 100; *Delk* v. *St. L. & S. F. R. R.*, 220 U. S. 580; *Erie R. R.* v. *Russell*, 106 C. C. A. 160; *Johnson* v. *So. Pac. Co.*, 196 U. S. 1.

The coal car in question did not comply with the provisions of the Act of 1893 or of 1910.

As to the Act of 1910 see Sen. Rep. No. 250, 61st Cong.

2d sess., p. 3; *St. L., I. M. & So. Ry.* v. *Taylor*, 210 U. S. 281.

The intestate was not guilty of contributory negligence and did not assume risk of employment. See Employers' Liability Act of 1908, 35 Stat. 65.

Action for loss of service and pain and suffering of intestate survived to his personal representative under the amendment of 1910, and see *Mich. Cent. Ry.* v. *Vreeland*, 227 U. S. 59; *St. L. & S. F. R. R.* v. *Conarty*, 106 Arkansas, 421.

The defective condition of the coal car was proximate and primal cause of intestate's death, and the evidence of defendant in error was competent. *St. L. & S. F. R. R.* v. *Fithian*, 106 Arkansas, 491; *Giles* v. *Wright*, 26 Arkansas, 476; *United States* v. *Clark*, 96 U. S. 37; 1 Greenleaf, §§ 348–350.

The evidence of Woolum and Daniels was also competent. 1 Greenleaf, 14th ed., § 440; *Eastern Transp. Line* v. *Hope*, 95 U. S. 297; *West. Coal Co.* v. *Berberich*, 36 C. C. A. 368; *Washington* v. *Baillie*, 92 U. S. 331; *Union Ins. Co.* v. *Smith*, 124 U. S. 405; *Tex. & Pac. Ry.* v. *Watson*, 190 U. S. 23.

The trial court had jurisdiction. 36 Stat. 1094; *Mondou* v. *N. Y., N. H. & H. Ry.*, 223 U. S. 1; *Southern Ry.* v. *Smith*, 205 Fed. Rep. 360; *Yazoo & M. V. R. R.* v. *Wright*, 207 Fed. Rep. 281.

The instructions of the trial court as given were correct. *Mich. Cent. Ry.* v. *Vreeland*, 227 U. S. 59.

The writ of error was improperly granted, no Federal question was raised that has not been adjudicated. *Mich. Cent. Ry.* v. *Vreeland*, 227 U. S. 59; *Delk* v. *St. L. & S. F. R. R.*, 220 U. S. 580; *Johnson* v. *So. Pac. Co.*, 196 U. S. 1; *St. L., I. M. & So. Ry.* v. *Taylor*, 210 U. S. 281.

Mr. Edward J. White and *Mr. E. B. Kinsworthy* filed a brief as *amicus curiæ*.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action for personal injuries ultimately resulting in death, the right of recovery being based upon the Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. 65; as amended April 5, 1910, c. 143, 36 Stat. 291, in connection with the Safety Appliance Acts, March 2, 1893, c. 196, 27 Stat. 531; April 1, 1895, c. 87, 29 Stat. 85; March 2, 1903, c. 697, 32 Stat. 943; April 14, 1910, c. 160, 36 Stat. 298. The injuries were received in a collision between a switch engine and a loaded freight car having no coupler or drawbar at one end, these having been pulled out while the car was in transit. The car was about to be placed on an isolated track for repair and was left near the switch leading to that track while other cars were being moved out of the way—a task taking about five minutes. At that time a switch engine with which the deceased was working came along the track on which the car was standing and the collision ensued. It was dark and an electric headlight on another engine operated to obscure the car until the switch engine was within 40 or 50 feet of it. The deceased and two companions were standing on the footboard at the front of the switch engine and when the car was observed his companions stepped to the ground on either side of the track, while he remained on the foot-board and was caught between the engine and the body of the car at the end from which the coupler and drawbar were missing. Had these appliances been in place they, in one view of the evidence, would have kept the engine and the body of the car sufficiently apart to have prevented the injury, but in their absence the engine came in immediate contact with the sill of the car with the result stated. The deceased and his companions, with the switch engine, were on their way to do some switching at a point some distance beyond the car and were not

intending, and did not attempt, to couple it to the engine or to handle it in any way. Its movement was in the hands of others. The car was loaded with freight moving from one State to another, the railroad company was engaged in interstate commerce and the deceased was employed therein at the time. He died from his injuries six days later leaving a widow and three minor children. The only negligence charged in the complaint was a failure to have the car equipped, at the end struck by the engine, with an automatic coupler and a drawbar of standard height as required by the Safety Appliance Acts, and there was no attempt to prove any other negligence. The plaintiff had a verdict and judgment for $10,000, and the Supreme Court of the State affirmed the judgment. 106 Arkansas, 421.

The principal question in the case is whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with it would not have resulted in injury to the deceased. It therefore is necessary to consider with what purpose couplers and drawbars of the kind indicated are required, for where a duty is imposed for the protection of persons in particular situations or relations a breach of it which happens to result in injury to one in an altogether different situation or relation is not as to him actionable. *The Eugene F. Moran*, 212 U. S. 466, 476; *Gorris* v. *Scott*, L. R. 9 Ex. 125; *Ward* v. *Hobbs*, L. R. 4 App. Cas. 13, 23; *Williams* v. *Chicago & Alton R. R.*, 135 Illinois, 491, 498; *O'Donnell* v. *Providence & Worcester R. R.*, 6 R. I. 211;

Metallic Compression Co. v. *Fitchburg R. R.*, 109 Massachusetts, 277, 280; *Favor* v. *Boston & Lowell R. R.*, 114 Massachusetts, 350; *East Tennessee R. R.* v. *Feathers*, 78 Tennessee, 103; Pollock on Torts, 8th ed. 28, 198.

The Safety Appliance Acts make it unlawful to use or haul upon a railroad which is a highway for interstate commerce any car that is not equipped with automatic couplers whereby the car can be coupled or uncoupled "without the necessity of men going between the ends of the cars," or that is not equipped with drawbars of standard height—the height of the drawbar having, as explained in *Southern Ry.* v. *Crockett*, 234 U. S. 725, 735, an important bearing on the safety of the processes of coupling and uncoupling and on the security of the coupling when made. It is very plain that the evils against which these provisions are directed are those which attended the old-fashioned link and pin couplings where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars when coupled into a train sometimes separated by reason of the insecurity of the coupling. In *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 19, this court said of the provision for automatic couplers that "The risk in coupling and uncoupling was the evil sought to be remedied"; and in *Southern Ry.* v. *Crockett*, 234 U. S. 725, 737, it was said to be the plain purpose of the two provisions that "where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard." Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate "the necessity for men going between the ends of the cars. 27 Stat. 531."

We are of opinion that the deceased, who was not

endeavoring to couple or uncouple the car or to handle it in any way but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the Supreme Court of the State erred in concluding that the Safety Appliance Acts required it to hold otherwise.

Judgment reversed.